

**PUBLIC OPINION ON SENTENCING IN PRETORIA**

**by**

**DOREEN JENNIE PITFIELD**

**submitted in accordance with the requirements  
for the degree of**

**DOCTOR OF LITERATURE AND PHILOSOPHY**

**in the subject of**

**CRIMINOLOGY**

**at the**

**UNIVERSITY OF SOUTH AFRICA**

**SUPERVISOR: PROFESSOR CMB NAUDE**

**CO-SUPERVISOR: PROFESSOR DP VAN DER MERWE**

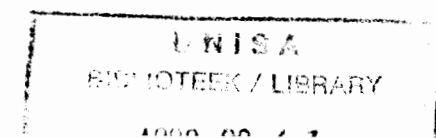
**NOVEMBER 1997**

**Title of thesis:**

**PUBLIC OPINION ON SENTENCING IN PRETORIA.**

**Key terms:**

**Public opinion; Public input; Sentencing policy; Crime surveys [UK, USA & SA]; Prison overpopulation; Prison costs; Theoretical Schools of thought; The human rights mandate; Rehabilitation; Prevention; Global punishment; Punishment in South Africa; Evaluation of sanctions; SA survey findings; Seriousness scores; Sentence choice.**



**364.60968 PITF**



**0001705776**

## **ABSTRACT**

The study explores the beliefs and wishes of respondents in Pretoria concerning crime seriousness and criminal sentencing in South Africa. It is suggested that in a democracy, the legal system must reflect the values of the individual citizen if it is to achieve a legitimacy based upon the concepts of moral consent and universality, and argues that this can only be achieved when all citizens have a voice. The study undertakes and reports on a survey of 400 units, across race divisions in and around the City of Pretoria by initially emulating, and thereafter extending, the British Crime Survey.

The thesis offers seven chapters divided into two primary components. The first component, chapters one to four, systematically debate the historical/theoretical foundations of sentencing practice (both globally and in respect of South Africa), and identifies the inherent problems faced by contemporary criminal justice systems. The study utilises sentencing literature to provide an in-depth appraisal of theoretical paradigms and, thereafter, evaluates the successes and failures of various sentencing options. The second component, chapters five to seven, unpack the Pretorian research in relation to various other foreign research surveys, and culminates by offering a South African sentencing guide (severity index) based upon the research findings.

The findings identify the people of Pretoria to be punitive. Respondents are shown to regard rape and driving whilst over the legal alcohol level causing the death of an innocent victim as the most serious crimes, followed by deliberate murder, selling illegal drugs and terrorism. Percentage differential between these "most serious" crimes is negligible. Many respondents indicate long prison sentences or the death penalty for these specific offences. Overall, Blacks prefer imprisonment whilst Whites are shown to be more conservative and more amenable to other sentencing options. Gender differences in relation to seriousness and sentence scores are slight, but females and the older age group are noted to be more fearful of being victimised even though this fear is not supported by actual victimisation rates. The study justifies the motivation for the inclusion of public opinion into sentencing policy by recording a 72 percent positive response to people involvement in the sentencing of offenders.

## OPSOMMING

Hierdie navorsing verken respondente in Pretoria se menings en verwagtinge aangaande die erns van misdaad en vonnisoplegging in Suid-Afrika. Die uitgangspunt is dat die regsplegingstelsel veronderstel is om die waardes van die gemeenskap te reflekteer, gebaseer op die konsepte van morele eenstemmigheid en universaliteit, en argumenteer dat dit binne 'n demokratiese bestel slegs kan realiseer as alle inwoners inspraak daarin het. Die navorsing en rapportering gaan oor 'n opname van 400 eenhede in en om die stad Pretoria oor rassegrense heen. Die Britse misdaadopname het as vertrekpunt gedien vir die ontwikkeling van die opname.

Die tesis bestaan uit sewe hoofstukke wat verdeel is in twee hoofkomponente. Die eerste komponent, hoofstukke een tot vier, debatteer sistematies die histories/teoretiese begrondings van die vonnisopleggingspraktyk (beide globaal en ten opsigte van Suid-Afrika), en identifiseer die inherente probleme waarmee kontemporêre strafregsplegingstelsels gekonfronteer word. Die navorsing gebruik vonnisopleggingsliteratuur om 'n in-diepte beoordeling te maak van teoretiese paradigma om die sukses en mislukking van die verskillende vonnisopleggingsopsies te evalueer. Die tweede komponent, hoofstukke vyf tot sewe, behels die navorsing in Pretoria in vergelyking met verskeie ander buitelandse navorsingsondersoeke en bereik 'n hoogtepunt deur 'n Suid-Afrikaanse vonnisopleggingsgids (ernsindeks) voor te hou, gebaseer op die navorsingsbevindings.

Die navorsingsbevindings identifiseer respondente van Pretoria as strafgeorieerd. Respondente beskou verkragting en bestuur van 'n motor terwyl die persoon se alkoholbloedinhoud oor die wettige perk is en die dood van 'n onskuldige slagoffer veroorsaak, as die ernstigste misdade. Dit word gevolg deur opsetlike moord, die handel in onwettige dwelmmiddels en terrorisme. Persentasie afwykings tussen die "ernstige" misdade is onbeduidend. Menige respondente is van mening dat lang termyn van gevangenisstraf of die doodsvonnis vir hierdie misdade toepaslik is. Oorhoofs gesien, verkies Swartmense gevangesetting, terwyl blankes meer konserwatief maar ook meer ontvanklik blyk te wees met betrekking tot ander vonnisopsies. Gendersverskille in verhouding tot die erns- en die vonnistellings is gering, maar vroue en die ouer ouderdomsgroepe vertoon groter vrees vir viktimisasie, alhoewel hierdie vrees nie ondersteun word deur werklike viktimisasieratio's nie. Hierdie navorsing onderskryf die motivering vir die oorweging van die gemeenskapsmening in formulering van vonnisopleggingsbeleid met die resultaat dat 72 persent respondente gemeenskapsbetrokkenheid in die vonnisoplegging voorstaan.



## **ACKNOWLEDGEMENTS**

### **Professor CMB Naude**

I acknowledge with sincere thanks the help and support of Professor CMB Naude of the Department of Criminology at the University of South Africa. Professor Naude was instrumental in the formulation of the initial concept to survey Pretorians on the crime issues facing South Africa. In her academic role Professor Naude is well known as an energetic researcher and writer on the problems of crime in society and as the researcher's promoter and colleague, gave generously of her considerable experience and knowledge as the study developed. Professor Naude's enthusiasm for her field of study, her scientific approach to research and her dedication to the project, proved to be an intoxicating motivational combination which encouraged the researcher throughout the project.

### **Professor DP Van Der Merwe**

I acknowledge with much gratitude the considerable help and guidance provided by Professor DP Van Der Merwe of the Department of Criminal Law and Procedure at the University of South Africa. Professor Van Der Merwe's knowledge of theoretical schools of thought considerably enhanced the researcher's interest and understanding of this area of study. As co-promoter of the study, Professor Van Der Merwe and the researcher spent many enjoyable hours debating theory and sentencing practice and his experience and insight into both academic theory and criminal legislation proved invaluable to the successful completion of the project.

### **Professor JH Prinsloo**

I acknowledge with genuine thanks the help given by Professor JH Prinsloo of the Institute of Criminological Sciences at the University of South Africa. Professor Prinsloo proved untiring in his efforts to provide the researcher with an understanding of how to conduct scientific criminological research. His help with the "unpacking" of demographic maps and his knowledge of fieldwork and its inherent problems within townships around Pretoria was invaluable.

### **Mrs E Keogh**

I offer sincere thanks to Mrs E Keogh, Chairperson of The Department of Statistics at the University of Zimbabwe, without whose help the study could not have come to fruition. Mrs Keogh facilitated the use of the SAS stastical programme running on the mainframe computer of the University of Zimbabwe, spent much time advising on binary research techniques, assisted with the formulation and production of statistical data and most kindly afforded the researcher many hours of discussion concerning what could (or could not) be achieved statistically, through the unselfish sharing of her considerable experience and knowledge of statistical research.

### **The Department of Criminology**

Considerable thanks are due to various people within the Department of Criminology at the University of South Africa. To Professor J. Naser, Chairman of the Departmental Research Committee, both for the provision of departmental research funds to aid the project and for his help and guidance on the correct way to research literature. To Mr MM Grobbelaar for his continuous help in the preparation of the questionnaire and, in particular, for his forewarning on the possible pitfalls of computerised coding. To Professor H Conradie for the many

conversations concerning sociological intersubjectivity, and to Dr MR Coetzee for the many debates on sociological theory. To Dr Engela Munnik for the typing of the questionnaire, for her knowledge and help with the Afrikaans language within the study, and for the field-work undertaken within the White survey areas. To Dr Irma Labuschagne for her help and knowledge of the crime of rape and to all the other colleagues in the department who willingly discussed various aspects of the study as it progressed, and whom in some cases, identified literature sources to substantiate the debate.

#### **Other departments and Institutes at the University of South Africa**

Grateful thanks are extended to Mr JW Wasserman and his committee in the Committee Services Section at the University of South Africa for the grant of research funds from the Domestic General Research Fund. Thanks are also offered to the various personnel within the Department of Computer Services, in particular to Mrs Berra Kemp who undertook to oversee the initial coding of the research data and production of the original frequency tables. Sincere thanks are also extended to Mrs. TA Burger, Subject Librarian: social sciences, and her team, for the continuous support in identifying and supplying study literature from the Library at the University of South Africa, and to the many academic and legal authors who feature in the study and from whom the researcher learnt and understood so much about the *criminological /legal* field.

#### **Professor DJ Stoker**

I gratefully acknowledge the guidance of Professor DJ Stoker, Senior Researcher at The Human Sciences Research Council in Pretoria, for his help in defining the type and size of survey to be undertaken.

#### **John Garwell**

Sincere thanks to John Garwell, Senior Student Councillor at the Open University in the United Kingdom, for his encouragement and support at the very beginning of the researcher's academic career.

And finally, genuine and grateful thanks to my husband Derek for his constant and unselfish support throughout.

November 1997  
Harare, Zimbabwe.

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# **CHAPTER 1**

## **INTRODUCTION**

# CHAPTER 1

## INTRODUCTION

### 1.1. OVERVIEW

The study which follows is an attempt to offer a critical input into the sentencing debate detailed below, by addressing the general public's perceptions on sentencing. The study argues that sentencing practitioners are faced with two major problems: viz., an increasing number of violent criminal offences and a general public who appear dissatisfied with the juridical treatment of crime within society.

In countries like the United Kingdom (U.K.) and the United States (U.S.A), the search for answers to such questions has not remained within the juridical/academic arena. Layperson *knowledge* is routinely gleaned through the medium of crime surveys. For example in the United Kingdom the British Crime Surveys (BCS) of 1982, 1984, 1988, 1992, 1994 and 1996, were undertaken to provide an index of crime in England and Wales to set beside the crime statistics recorded by the police. The BCS takes into account both the amount of crime occurring and the public perception of seriousness. In this respect the BCS can be argued to provide a more comprehensive guide to crime in Britain than that provided by the *official* crime figures. Similarly, in the United States of America, the National Surveys of Crime Severity seek public input as an indication of like knowledge. Further afield, the United Nations Interregional Criminal Justice Research Institute (UNICRI) mounts international crime surveys to provide a more *global picture* of crime. South Africa participated in the International Crime Victimization Survey (ICVS) for the first time in 1992, and again participated in the 1995/6 survey.

To date, as far as can be ascertained, the South African public have not been afforded the opportunity to take part in providing a "more comprehensive index" of crime in the country, or to give their views on what they would consider to be an appropriate sentencing policy for South Africa.

Some rectification of this lack of public/community involvement appears within *Justice Vision 2000*: A draft strategic plan for the transformation and rationalisation of the Administration of Justice, wherein the Mission statement identifies one goal of *Vision 2000* as "To incorporate and expand community participation in the administration of justice" (1996:4). However, further reading of the goals of *Vision 2000* reveal that involvement refers to usage of facilities rather than involvement in the actual setting up of those facilities. The draft introduction refers to a justice system which needs to be:

*...representative of the entire society...[a system wherein]...[C]ourts will have to change their image and become more user-friendly. [A system in which] [R]eform...of the administration of justice is a fundamental prerequisite to...legitimacy... (1996:1).*

This study would argue that *reform* of this type is not an invitation to participate, but rather a blueprint for action which, although it aims to "...deliver access to justice...[and]... involve the community to the greatest extent possible in the decision-making processes relating to the dispensing of justice" (1996:2), is still impositional by nature because the system is already "set-up", pre-defined in relation to criterion agreed upon by elites. It can be suggested that the following quote from *Vision 2000* highlights that The Vision's "community decision-making process" falls somewhat short of the community involvement envisaged within this study:

*Due to the social and economic differentiation that characterise South African society, access to justice has largely been skewed... facilitative measures that will ensure **affordable access to the justice machinery** and related institutions need... be given priority in the planning of transformation (1996:2).*

In an attempt to address what the researcher still perceives as a "skewed" community involvement, the present research undertook a survey of the inhabitants of the administrative capital of South Africa, Pretoria. It is hoped that by recording answers to questions on the amount of crime, perceived seriousness, victimisation, sentencing preference and public response in relation to the decriminalisation of some crimes, the Administration of Justice might benefit from a community involvement which begins at grass roots level by providing the public with a voice to say what they perceive as a transformatory element within the Administration of Justice - not its usage, but rather its **soul**.

### **1.1.1 The sentencing debate**

Several global issues are identified within the literature as reasons why sentencing needs to look for ways, other than internment, to combat the crime problems inherent in society. It will be argued that it is no longer feasible for government and the judiciary to take total responsibility for both the effects of crime, or its remedies. It is suggested that the broader society needs to become more fully involved in all areas of concern, for example crime detection, prevention, and punishment, if a reduction in crime is to be *successfully* realised. For example, one of the major pushes for wider social involvement can be seen in the area of prison resources. Prisons throughout the world are over full, the costs of prison administration are escalating. It is suggested that matters are made worse by an uninvolved public who continually call for harsher sentencing practice (more internment). In this respect the Department of Correctional Services in South Africa report that as at April 1996 (1996:5),

prison overpopulation was 27 percent. World-wide, government economies are severely pressed to keep abreast with the need for more commodities (prison space can be seen in this sense), as serious crime increases. However, it can be argued that building more prison space increases rather than decreases crime and its costs. Furthermore, authors on the subject, for example McCarthy & McCarthy (1991:6), reason that there is "...a growing recognition that increased prison construction only leads to higher levels of incarceration, [and costs] with no discernible impact on crime".

It is also variously postulated that internment is a purely punitive resource which has little value in terms of re-education of offenders, often, it is suggested, rendering them more criminal on release and thereby worsening the incidence of crime rather than lessening it. This appears to be the case in South Africa with the Naude (1997:171) noting an 80 percent recidivism rate during 1995 over a five year period. It is widely recognised, therefore, that alternative sanctions for certain categories of offence need to be adopted. In this respect Lord Longford (1991:157) notes that:

*Practically every discussion on how to reduce prison population and juridical costs, concludes that the judiciary must be induced to be much less severe in their sentencing policy...*

And this involves finding ways to punish certain offenders without the need to incarcerate them. In the U.S.A. these issues have led to the establishment of sentencing commissions assigned the task of finding sentencing options which sanction or control the offender within the community, whilst at the same time retaining the goals of punishment. Primarily, community-based correction involves the use of various types of non-institutional correction programmes, for example probation and community service, the aims of which are to punish and at the same time re-educate in order to reintegrate the offender into society. Community-based sanctions are generally believed to offer cost-effective means of sanction, but are not altogether conflict free. For example, probationary requirements need secure community support structures because they invariably involve prescriptive restrictions on offender behaviour, the enforcement of which can be difficult. Therefore, community-based sanctions need the backing of the general public if they are to succeed in gaining both support and success. According to McCarthy & McCarthy (1991:2) the task of such correction programmes involve:

*...not only efforts directed toward changing the individual offender, which has been almost the exclusive focus of rehabilitation, but also mobilisation and change of the community and its institutions.*

The British and American systems have well developed correctional service departments which have been in operation for a number of years, and various *alternative* punishment programmes are running successfully in these countries. So successful have many of these programmes been, that Davies (1993:3) is able to refer to two documents published in 1990 which motivate an expanded role for community-based forms of intermediate punishments, viz., in California: the Blue Ribbon Commission's Report on *Inmate Population Management* and in London the Government White Paper on *Crime, Justice and Protecting the Public*. He says that these reports, whilst they do not "... proclaim the 'end of prisons' [do recommend] a more selective role...". Davies argues that these documents offer "...textual clues to developments to current penal thinking on the need to reform sentencing policy", by heralding "...a new penal era of community-based intermediate sanctions...", supported in many instances by government funding and unopposed and countenanced by the British and American publics' respectively. South Africa has drawn on these systems to provide a correctional services division with similar aims: to punish as many offenders as possible outside of the prison facility. However, South Africa is faced with a very different set of problems to those experienced in the United Kingdom and the United States of America.

To begin with, social support structures do not exist in many areas of South Africa. This point is borne out by Jonker (1993:307), who in discussing correctional supervision, notes that, "...large portions of our country [S.A.] are at this stage inaccessible...", and this remains the case to date. Also, it is true to say that, unlike the U.K. and U.S.A. programmes, in South Africa the funding of community based correctional programmes are inadequately financially supported from government coffers. For these reasons, only a mere 22 percent of current South African sentences involve any form of community based sanction (Naude 1997:170). This situation, when taking into account the financial burden of change now imposed upon government in all sectors of South African society since the democratic elections, will probably not improve in the foreseeable future.

Also, it is widely believed that the public tends to view non-custodial sentences as soft options to imprisonment. In this respect, Lord Longford (1991:174) indicates that in the U.K. "...government...fear public opinion will be opposed to any increasing 'softness'", [he intimates 'softness' as non-custodial punishment], whilst in the U.S.A. Barkdull (1988:15) is able to point out that, "Parole is still thought of as leniency...". Governments are, therefore, forced to address what Davies (1993:3) suggests is the "...credibility and consequences of sentencing reform..." by instilling confidence - in this instance within the public consciousness - for sentencing options that do not involve the sanction or prolongation of imprisonment, and which, at the same time, retain the confidence of the public. He says:

*The question of effectiveness, as measured in terms of recidivism rates, has to be set alongside the inter related question of intra-system credibility and extra-system public confidence. That is, acceptable both to the public, in whose name penalties are inflicted in a democracy, and to the professionals who have to make sense of them.*

It is postulated in a subsequent chapter of this work, that intermediate sentencing options not only appear to keep prison numbers and costs down, but are worth lobbying for on many other counts. For example, intermediate sanctions allow offenders to retain their links with society, and in so doing afford far greater opportunity for reintegration into social structures once the period of sentence is served. And, most worthy in the researcher's opinion, is the chance to bring victim and offender together in a joint effort at restitution. Such "effort" may effect a *change of heart* on the part of an offender who is faced with the *reality* of victim distress and, therefore, might be argued to provide a form of deterrence which is often overlooked by the judiciary. Also, one may claim that joint restitution, in terms of a Marxist philosophy, is something of an "equalising/sharing of guilt": an acceptance that crime is a social problem faced by every member of a particular society.

#### **1.1.2 The introductory chapter**

In this chapter the study programme is outlined. The chapter discusses the following areas:

- a) review of relevant literature pertaining to public involvement within juridical policy making
- b) discussion of the link between literature on public involvement and the researcher's rationale for the study, i.e. a lack of scientific knowledge in the field of public involvement in South Africa, and the researcher's personal concern that lay people should take part in sentencing policy formulation
- c) the aims of the study
- d) the measuring instrument, the methodology used to collect the data, development of the questionnaire, the pre- test and pilot study, sampling procedure followed, collection of the data, training of the field workers and the fieldwork
- e) data analysis and details of statistical techniques used, data presentation in the form of tables, charts and graphs, reliability and validity of the study material
- f) hypotheses
- g) contribution of the research

### **1.2 STATEMENT OF THE PROBLEM**

As argued above, according to the literature there is an increasing push towards sentencing reform which aims to punish the offender within the community. For example it was noted that

Davies (1993:11), in discussing the common themes of the 1990 California Blue Ribbon Commission's Report and the British Government White Paper on crime, indicated that "...[both] reports stressed the need for alternatives which could be regarded as [non-institutional] punishment...". Furthermore - in opposition to the ideas of Longford and Barkdull - research does show, that the public are not totally adverse to alternative non-custodial sanctions. For example, Walker, Collins & Wilson's (in Walker & Hough 1988:159) research on sentencing in Australia shows that "Significant numbers of Australians (when asked) are willing to suggest non-custodial alternatives to imprisonment". Lein, Rickards & Fabelo's (1992:189), report on a telephone survey in Texas aimed at assessing the public attitude toward sentencing indicate that "To varying degrees respondents supported different policy options including alternatives to prison...". Hough & Moxon's (1985:166) discussion of research on the "fit" between sentencing policy and public opinion suggests that at least in respect of the juvenile offender in the U.K., "...both the courts and the public are less likely to favour imprisonment and more likely to opt for community service..." .

According to literature however, it is also true to say that the initiative for non-custodial sentencing appears to be increasingly under fire, fuelled by a public fearful of their safety in a climate which is perceived as becoming increasingly violent. Many authors note this change in terms of a replacement of the 1950's initiative for indeterminate sentencing policies - broadly based upon the treatment model - to those of a more determinate mandatory sentencing structure which favours punishment as opposed to rehabilitation. For example, Benekos (1992:7) suggests that this *change* in sentencing philosophy occurred during the 1970's and was brought about by a growing lobby of critics who questioned the assumptions and outcome of the indeterminate rehabilitative model. He argues that indeterminate sentencing was seen to be too discretionary, as he puts it a *coddling of criminals*, which permitted judges to be *soft* on offenders and which, therefore, resulted in a lack of what Benekos terms a *truth* in sentencing. In response to what he calls a "disgruntled public" he says that the:

*Sentencing Reform Act of 1991 was promulgated as a truth in sentencing bill [which placed] emphasis on punishment, certainty, and severity of the sentence ...[and] reflected elements of the [70's initiative for] a get-tough ideological response to crime and the just-deserts philosophy of sentencing...*

In the same way, Cullen, Clark & Wozniak (1985:16) indicate that in the U.S.A.:

*Over the course of the past decade, a movement to get tough on crime has emerged across the nation [evidenced they suggest] by [a] swing in the direction of law and order [the] reintroduction of [both] capital punishment [and] the passage of stringent laws calling for mandatory incarceration.*

Cullen, et.al., (1985:16) denote this call for toughness - what they term an imprisonment spree, to "...U.S. citizens [who] reached a critical level of panic and anger at what they feel is a constantly lurking threat...". Whilst the authors warn that quantitative knowledge of public opinion is scarce, they do advance the belief that the growth of punitiveness in sentencing practice in the U.S.A. is partly "...[a] system's response to 'what the public wants'". In this respect the U.K. public would seem to agree. Michael Howard (1995:31) - the British Home Secretary - discussing his so-called get tough policy on crime in a Weekly Telegraph article argues that:

*...the balance in our [U.K.] criminal justice system [has] tilted too far in favour of the criminal and away from the rights of law abiding citizens.... [This he says is] ...overwhelmingly the view of the general public...[who do not think] ...that I [have] gone too far in being tough on crime at the expense of the rights of the individual.*

So what do the public want in a crime/sentencing policy?

In answer to this question, knowledge of public wishes on crime and related matters in the U.K. and the U.S.A are, as noted above, routinely gleaned through the medium of crime surveys. Therefore, one can assume that in these countries public sentiment is considered relevant to the debate on crime and is, furthermore, influential upon the constitutional governments and their elected juridical subsidiaries. It can thereby be asserted that within the democratic arena in the U.K. and the U.S.A., public opinion forms an integral part of governmental procedure on the formulation of juridical policy.

### **1.2.1 United Kingdom and United States of America crime surveys**

As already noted, in the United Kingdom and the United States of America regular crime surveys *invite* public input into juridical policy decision making. This "invitation" can be justified on several levels. Firstly, government is *democratically* elected by public vote. Democratic election provides for what can be termed government by the people, - a form of government in which the *sovereign* power resides in the people and is exercised directly by them, or by officers elected by the people to administer on their behalf. Therefore, as representatives of the people, the governing body aims to reflect the sentiments of the general public and to further such within, in this case, the area of juridical policy making. Secondly, juridical personnel are themselves *public* citizens. Legal appointments take into account such concepts as training, knowledge and in the case of judges, "experience" in the juridical field, and, furthermore, encompasses lay person involvement through the "swearing in" of public juries in the courts themselves. Sentencing thereby takes place from what one might term a *platform of public involvement* with a government which discharges its



responsibilities on behalf of **society** as a whole. In this way the public are assured that legal personnel (judges, advocates, prison governors, paralegal, probationary services personnel etcetera), and the general members of society, fulfil what must be termed the true obligation of justice: to protect both the wronged and the wrongdoer. Justice personnel are, therefore, at one and the same time representatives of both government and public, they are both official and subject, affected by the same circumstance and influences within a particular period of time. This is what Lord Radcliff (in Hall 1987:134) refers to when he says, "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by...". Thirdly, both the United Kingdom and the United States have kept abreast with public sentiment on criminal matters by asking their public what they want from a criminal policy, thereby upholding their obligation as chosen representatives of and for the people.

In the section to follow the U.K. and the U.S.A. crime surveys are looked at in more detail.

### **1.2.2 The British crime surveys**

According to Mayhew (1997:6) in the February 1997 RSS News (Royal Statistical Society), "The British Crime Survey has now been carried out six times, under the auspices of the Home Office (without the involvement of the United Nations Interregional Crime and Justice Research Institute [UNICRI]), and is currently run every other year". Mayhew says that as an alternative count of crime to offences recorded by the police:

*...the BCS [can] provide many interesting comparisons with the police figures. For example, BCS crime grew much more slowly than recorded crime between 1981 and 1991, whereas between 1991 and 1993 acquisitive crime and vandalism in the BCS grew faster than the police figures, and from 1993 to 1995 BCS crime rose by 2 per cent while the level of recorded crime fell by 8 per cent.*

Also, International Crime Victimization Surveys (ICVS) have been conducted in industrialised countries three times, in 1989, 1992 and again in 1991. Mayhew says that the working group which steered the three surveys included UNICRI for the second and third industrialised country sweeps. She indicates that "...this country's figures [U.K.] were put into an international context..." and notes in this respect that "[A]lthough the BCS does not confirm falls in police recorded crime between 1993 and 1995, it does show a significant stabilisation...[confirming] a similar pattern...seen in many other countries" (1997:6).

According to the various reports issued by the National Opinion Poll (NOP) under the auspices of the Social and Community Planning and Research Unit (SCPR), British Crime Surveys aim to discover levels of victimisation in Great Britain and to generate attitudinal data on issues

relating to crime within that country. The first three BCS survey sweeps used the same questionnaire format and aimed to replicate knowledge gained in order to provide correlative material. However, some modifications were undertaken after the 1981/2 crime survey. Both the 1984/5 & 1988/9 surveys added the new dimension of measurement of different types of crimes in terms of how serious respondents felt them to be. According to Tuck (1988:iii), "This was done in relation both to offences which respondents had experienced themselves, and to a number of hypothetical offences. Seriousness ratings were obtained for both, as well as respondents' views on what penalties were appropriate for offences of differing degrees of seriousness". In the 1988/9 survey, an additional sample of ethnic minority respondents was also included. Tuck (1988:iii), further suggests that:

*Counting crime with seriousness taken into account, can give a picture of the crime problem from the perspective of actual or potential victims. Measurements over successive time periods...prove valuable in monitoring how attitudes to law breaking change.*

According to del Frate, Zvekic and van Dijk, *UNICRI Publication No.49 (1993)*, the United Kingdom first took part in the UNICRI crime surveys in 1989, which surveys utilised a different questionnaire to the BCS surveys.

### **1.2.3 The U.S. Department of Justice National Survey of crime severity**

In the United States of America, the National Survey of Crime Severity (NSCS), in conjunction with the U.S. Department of Justice: Bureau of Justice Statistics, also conduct regular crime surveys. Like the United Kingdom sweeps, the emphasis of these surveys is, amongst other criteria, to ascertain the wishes of the public at large. And like the subsequent crime sweeps in the United Kingdom, the format of questionnaires used in these surveys is updated to include relevant areas of public concern. For example, the 1977 survey contained a supplement to the main survey which addressed the public's view on the seriousness of crime. This seriousness supplement was added to the main crime survey in order to construct a *severity index* to measure how the general public rank the severity of a wide range of crimes.

The attempt at severity ranking of crimes required each participant to assign a numerical value to a list of crimes which were to be rated in order of seriousness. According to Schlesinger (in the National Survey of Crime Severity 1985:iii):

*The severity index represents an innovative way of looking at crimes. It points towards priorities and reaffirms basic values.*

Although Schlesinger argues that more developmental work is needed before a crime rate weighted by the seriousness of the crimes is possible, he maintains that such effort succeeds in generating attitudinal data on issues relating to crime which otherwise would not exist. At the same time it involves the lay person within an arena of debate which aids the management of crime within society. Therefore, it can be stated with conviction, that both the United Kingdom and the United States of America recognise the importance of general public involvement within juridical policy matters.

#### **1.2.4 The changing face of South Africa**

Unlike the United Kingdom and the United States of America, South Africa has not, until now, provided a platform for *public* involvement in juridical decision making in the country. However, in 1994, democratic independence and the formation of the Government of National Unity gave legal representation to all South Africans. This change thus paved the way for the research which now forms the bedrock of this thesis, by for the first time providing the *democratic* justification for public involvement within the arena of sentencing practice and policy making in South Africa.

### **1.3. THE MOTIVATION FOR PUBLIC INVOLVEMENT**

Considerable literature exists within the subject area of sentencing which recognises both the requirement and justification for public involvement in sentencing practice. For example Faulkner (1993:2) justifies a public involvement by saying that:

*Most Western countries would now recognise that...sentencing principles and sentencing policy are matters of general public importance and need to be publicly determined.*

Whilst in South Africa, the requirement for involvement can be motivated by the survey undertaken for this thesis which shows that of the 400 respondents interviewed, 288 (72%) want an input into the sentencing arena.

Via extrapolation, the various literature on the worth of public input into sentencing can be addressed by certain relevant concepts. For example Benekos (1992:7), noted earlier, uses the concept of truth in relation to just desert. He variously indicates that truth means "...certainty, proportionality and fairness in criminal sentencing". This thesis would argue that truth can only be fair when the public are involved in deciding what fairness is. Accountability is another concept which is often mooted about in criminal justice circles. But one must ask the same question, accountable to whom? Accountability must relate to society as a whole, a concept which embraces both juridical policy and the public for whom that policy is representational. Lord Denning quoted in Hall (1987:134), notes this widened responsibility by

introducing the notion of "gaps" between government intentions and the practicalities of sentencing within the courts. He says "We sit here to find out the intention of Parliament...and carry it out...we do this better by filling in the gaps...". This thesis would suggest that gaps are a form of accountability to fulfil not only governmental intentions, but also the intentions of *society* as a whole. Here again accountability can only be meaningfully defined when the concept is applied to all people, and not just to members of the government or judiciary in terms of governmental motives. This Hall (1987:129) refers to as a means to legitimise the courts' accountability, to provide a:

*...broad based [in these terms interpreted by the writer to mean "public"] consensus about moral conduct [which is] the basis of consent on which the courts [rest].*

Such a notion leads to what Adinkrah (1991:230) suggests is a knowledge that:

*...authority is distributed and exercised in a proper manner...[which is only] achieved when political institutions and procedures are seen as reflecting the basic values of the individual citizens.*

Legitimacy and accountability thereby carry with them a force of moral sanction which ensures that the level of public compliance and support is high.

To achieve this desire in sentencing practice, the general public must believe that they have • influence on judicial actions: that those in power are acting in the best interests of the governed. Only when public opinion is searched and the resultant knowledge utilised to inform judicial policy, can such a *legitimacy* be said to exist. Then, and only then, can a truth in sentencing be *truly legitimate*, when it functions within an arena which represents the will of all of the people. In this way, the definitions of truth, legitimacy and accountability in sentencing take up a moral sanction of consent whereby the legal system's credence is acknowledged to rest upon universality.

Bearing this in mind, there are other factors which uphold the need for public opinion in sentencing. For example, according to Walker & Hough (1988:1), "Crime is far more visible politically than it was a decade or so ago...", and this means that sentencers can no longer disregard public opinion, unless they wish to overstep the limits of public tolerance. As a primary social problem, crime evokes emotive feelings of fear, sometimes futility and more often than not, outrage in the public sector. These emotions must be addressed and taken account of by both government and the legal fraternity if public support is to be gained.

Walker and Hough indicate in this respect that "...political arguments about the response to crime [need to be] increasingly buttressed by appeals to public opinion". They note that:

*...legislatures and judiciaries...both have an eye on the audience; and in this case, the audience is not [only] the man in the court but the man in the street.*

Involving the audience can, as one has seen, be variously motivated for. For example as an Adinkrah, or Hall, morality which has to include *the basic values of the individual citizen* if it is to provide a legal system which is both legitimate and accountable. Juridical practice thereby involves a shared responsibility which recognises that crime as a social problem needs to be addressed socially; it is not a them versus us situation. Another benefit of such a sharedness is knowledge of the victim of crime whom Walker and Hough (1988:10) note "...comprise an important sub-group of the general public." . Just how beneficial is this knowledge?

### **1.3.1 The benefits of public input**

Much of the literature pertaining to crime surveys in many countries relates to the knowledge gained from the victims of criminal acts. Such knowledge is invaluable when trying to form a picture of the extent of crime within society, and this value is recognised by many writers in the field. For example, it was noted earlier that Tuck (1988:iii) says that "...[crime surveys]...can give a picture of the crime problem from the perspective of actual or potential victims". Walker & Hough (1988:10) suggest that "...the courts should place greater emphasis on redressing the harm done to victims, and ...sentencers should thus attach special weight to their views...". van Dijk & Steinmetz (1988:74) indicate that "It is widely believed [the public call] for tougher sentences stems from personal experience of crime...". And Hough & Moxon (1988:144), argue that knowledge based upon various British crime surveys shows what appears to be "... a clear desire amongst victims that offenders should make some redress for the harm they have caused". What these findings, and many others portray, is that there is a wealth of helpful knowledge to be gained from the inclusion of public opinion (whether spectator or victim) in the arena of sentencing policy.

Likewise, the more *official* literature motivates the benefits of regular survey measurements in other areas . For example, Wolfgang et.al. (in the National Survey of crime Severity 1985:v) published by the U.S. Department of Justice, Bureau of Justice Statistics states:

*An accurate measure of the seriousness with which society views a broad range of criminal events would be helpful to lawmakers and policy makers - it could provide a measure of the appropriateness of sentencing practice and it would assist in the allocation of scarce criminal justice resources. It would even*

*indicate more accurately than at present [as further studies are undertaken] whether crime is increasing or decreasing and by how much.*

Mayhew & Maung (1992:1) say that crime surveys can provide "... an index of crime ...to set beside the statistics recorded by the police ", and that even though one must not claim any positive level of crime, or of public opinion from crime surveys, surveys do at least provide a *guide* to areas like the extent of crime and crime trends and what the public think they want done about them. They also allow one an insight into *preferred* punishments for specific crimes and can assist in providing correlates of offence seriousness and sentence severity.

Furthermore, Wolfgang et.al. (in The U.S. National Survey of Crime Severity 1985:1) says that:

*...maintenance of measurement and data systems is of paramount importance for the criminal justice community and the public it serves. To this end, recent developments in crime measurement have used techniques that involve the general population in the data-generating process....*

From the above it can be argued that the public do have a part to play in sentencing reform and certainly regular surveys help policy makers to formulate ideas on the amount of crime taking place in society. However, where public involvement is concerned there are conflicting views on how much of a part the public is able to play. The notion is often expounded within legal circles that the public forms an uninformed group where legal/criminal matters are concerned. This proposition poses the question of whether or not public wishes concerning punishment of offenders should be taken into account, and if so, what might the benefits be?

#### **1.3.1.1 Should punishment reflect the wishes of the general public?**

Bearing in mind what was noted earlier concerning the politically motivated reasons for including public opinion in juridical policy decisions, there is little doubt that as crime figures rise so too does the public call for harsher, more punitive, sanctions to be imposed upon the offender. It is often argued by those who think of the public as *uninformed*, that they react in terms of a moral panic philosophy when they fear for their general safety, or that the victims of crime are unacceptably vindictive towards offenders. Both polemics of this argument can be substantiated within the academic literary debate. For example Hindelang (1974:115) notes that:

*A 1972 national sample [in the USA] was asked: 'What's behind the high crime rate in the United States?' One in four [respondents] cited laws as being too lenient or penalties not being stiff enough....*

On the other hand Stanlans & Lurigio (1990:333) indicate that "When sentencing detailed cases, lay persons are more lenient than judges..." . In terms of victims, in the UK situation, Hough & Moxon (in Walker & Hough 1988:137) say that "Victims did not seem to be very punitive...a quarter of the sample felt that fewer people should be imprisoned" . However, the same writers note that:

*Questioned about their own cases, victims were on balance more punitive than the courts; comparing 135 court sentences to victims' preferences as stated to the researchers before the case reached court, 43 per cent were less severe than victims had hoped for, 33 per cent were as severe, and 23 per cent more severe.*

Notwithstanding Hough & Moxon's finding, according to Naude (1996) the research of, amongst others, Erez & Tontodonato 1990, (in Naude 1996:167) indicates that "...victims are not excessively punitive or vengeful...[and that] victims in general do not desire heavy sentences". Naude says that this situation "...is borne out by the hearings at the Truth and Reconciliation Commission where very few victims or their families want revenge..." (1996:167).

According to Naude (1996:164) many countries now require a "victim impact statement" and although in Europe such statements are not required, Walker and Hough (1988:10) note an increase in victim participation in court proceedings, saying that in various instances "...it is becoming increasingly common for courts to give victims an opportunity to state their preferences before sentence is passed [upon an offender]..." and that such opportunity is directly linked to the redressing of harm done to victims. But they further acknowledge that one of the main purposes of the justice system is to protect offenders from what they call the *capricious vengeance* of the victim. Such ideas are, of course, innately linked to the aims of punishment itself and it is widely accepted now that punishment stands at something of a watershed in terms of rehabilitation versus punitive sanction. However, as noted earlier, within current literature there is a strong swing back to a more punitive sanctions policy throughout the world, what various writers in the field note as a return to a more just deserts policy of punishment. For example, to name but a few authors, Bottoms (1993) who speaks of the apparent rise of just desert theory, Faulkner (1993) who says that governments' (U.K.) approach is to adopt the principles of just deserts, Thomas (1993) who indicates that the Criminal Justice Act 1991 in the U.K. is based on the principle of just deserts and von Hirsch who argues that desert philosophy is considerably influencing sentencing policy.

Bearing these ambiguities in mind, this chapter moves on to look at the questions posed by the present study.

#### **1.4. THE AIMS AND RATIONALE OF THE STUDY**

The study aims to provide a historical overview of the theoretical development of sentencing practice and punishment within the United Kingdom and the United States of America and, thereafter, to appraise the development of punishment/sentencing theories in South Africa: assuming for the purposes of study, that South African juridical policy can be seen as akin to these two first world jurisdictions. To achieve this aim, the study undertakes to evaluate the success/failure of specific punishment sanctions from various parts of the world, and utilises the debate to evaluate the influence of public opinion upon sentencing policy within both the U.K and the U.S.A and, thereafter, South Africa. Due consideration is given to the meaning of punishment as an ideological platform in sentencing, and to the concepts of impartiality and accountability within the judiciary. Once these concepts have been defined and placed within the framework of South African law, the study undertakes an empirical assessment of the Pretoria public's views on:

1. seriousness ratings of various offences
2. preferred choice of sentence for specific offences
3. effects of mitigating circumstances upon sentence choice, and
4. views on the decriminalisation of specific offences

Where applicable, the South African findings are compared with similar British crime studies to determine significant differences or similarities within the two countries (U.K./S.A.) thus providing, in the case of South Africa, an innovative contribution to the sentencing debate in the country.

Having taken the stand earlier that accountability and moral sanction within the penal policies of both the United Kingdom and the United States of America are innately linked to the wishes of all people, the study aims to provide a comparative survey of the influence of public opinion on both sentencing theory and practice. Furthermore, the rationale is to open up the debate to fresh input by placing the views of lay persons alongside the ideas of leading commentators in the academic, judicial, practical and legal fields of research on public opinion and penal concerns.

The findings within the study are presented in the form of percentage tables, charts and graphs using the independent variables of race, gender, age, education, language, occupation, marital status and religious belief, for statistical analysis (see section 10 to follow and chapters 5 and 6)

Finally, an attempt is made to provide a South African sentencing guide based on the public response reported within the research findings (see chapter 7).



## **1.5 THE CENTRAL RESEARCH THEME (HYPOTHESES)**

In line with the aims and rationale of the study, the central research themes revolve around four areas of interest. It was hypothesised that South African courts have, until recently, perceived the public to be voiceless, and therefore viewless, on crime and sentence procedure in South Africa; that the courts are out of step with public opinion on crime seriousness and sentence; that the public thereby feel excluded from the juridical process, and that sentencing would benefit practically from the inclusion of lay person ideas.

### **1.5.1 Contribution of the study in relation to the research theme (hypotheses)**

The major contribution of the study undertaken is to provide knowledge of the people of Pretoria's wishes concerning sentencing reform in South Africa. It is postulated that this *knowledge* is directly linked to providing answers to the research hypotheses already stated and that this attempt will inform the South African authorities of public sentiments in the area of sentencing reform and, most importantly, provide a platform for further research.

Turning to literature on the subject, the following observations can be made in support of the research and its initial research theme. On the one hand Riley & Rose's (1980:345) research into public versus elite opinion on correctional reform in the state of Washington, U.S.A., suggests that "...'corrections' is the part of the criminal justice system that the public...knows least about", whilst this research shows that, notwithstanding, when asked, a full three quarters of the respondents surveyed wish for an input into sentencing. Therefore, one might argue that a perceived lack of public knowledge on correctional reform is not to be seen as an acceptance that the public are happy to leave juridical decisions to the *elite*. Likewise, although Hough & Moxon's (1985:161) survey into seriousness begins by stating that "...it is widely supposed that those involved in the administration of justice are less punitive than the public"..., the authors' are forced to refute this hypothetical assumption when they note that "[F]indings...call this belief into question...". It can, therefore, be argued that the courts are possibly "out of tune" with public opinion and that there may be benefits to be gained from including lay person ideas. In this respect it is perhaps pertinent to recall Tuck's (1988:iii) justification that the value of measuring seriousness can provide an insight into any change "...[of public] attitudes to law-breaking..." over time.

## **1.6 THE DEFINITION OF KEY CONCEPTS**

The study identifies the following key concepts:

### **Public Opinion**

In the study the concept of public opinion refers to the prevalent beliefs of the people in Pretoria. By "prevalence" is meant "majority" which Childs (1965:17) suggest can be thought

of as "...the coming together of the minds and feelings of the people, or a large part of the people, in common agreement on the same definite conclusions or body of conclusions".

### **Sentencing**

The concept of sentencing is taken to mean a decision of the court which declares a punishment allotted to a person convicted in a criminal trial. According to Cilliers et. al. (1990:62) "...a person is culpable if he (sic) has acted unlawfully...". Thomas (1980:9) says that this "...requires the sentencer to find the sentence which most accurately reflects the offender's culpability...".

### **Judiciary**

The term judiciary is utilised as a **blanket** term which covers all acts and persons pertaining to the administration of justice within the criminal proceedings of the law, and embraces the notion of a state collectivity. This according to Konecni & Ebbersen (1982:3) can be conceived of as the "...behaviour of participants in the [legal] system as determined largely by the rule of law, due process and administrative guidelines".

### **Severity index**

The term severity index is utilised in the study to indicate the public's beliefs on the seriousness of crimes in order of public concern. Such an index, according to Wolfgang et. al. (1985:1-14 variously), could lead to a guide for more consistent sentencing, more effective resource allocation and a more accurate measurement of the crime rate.

### **Decriminalisation**

Decriminalisation is defined for the purpose of the study as the process whereby certain behaviour which has been deemed to be punishable by criminal law is declared to be no longer criminal.

## **1.7. THE RESEARCH METHODOLOGY**

### **1.7.1 Development of the questionnaire**

The questionnaire was developed by the researcher in close co-operation with *experts* from the University of South Africa (for example, personnel within the Department of Market Research and colleagues from the Department of Criminology and the Institute for Criminological Research), together with knowledge gained from literature on questionnaire design. The research and literature study for the research was finalised in January 1997.

The questions used for questionnaire surveys can be of one or two types - either **closed** requiring pre-set answers such as a yes, no, or don't know, or **open** requiring the respondent to give an opinion. Fixed-choice **closed** questions and responses are more easily tabulated

and compared, but have the disadvantage of being restrictive in the amount of information they provide. However, they are invaluable in gaining biographical information from the respondent, for example gender: Are you male or female, mark M or F. **Open** questions do not provide the respondent with a pre-conceived list of choices from which to choose. The advantages of **open** questions lie in their ability to offer respondents the chance to air their views and opinions, whilst the disadvantage is their *multi-choice* coding options. It is arguable that what Giddens (1992:671) refers to as the ability of *open* questions to provide *richer* information, becomes totally lost by the inability of the researcher to make sensible coding decisions prior to summarisation and data analysis.

Bearing these considerations in mind, and the nature of the research itself, the questionnaire employed **closed** questions, and what Hughes refers to as **fixed-alternative** questions. According to Hughes (1981:154) **fixed-alternative** questions are questions which, although they limit respondent answers to pre-given alternatives, provide a more elaborate/comprehensive choice of answer than mere yes/no. This means that coding and keying in of questionnaire answers can remain a precise action which is verifiable as the process proceeds. In this respect Floyd & Fowler (1988:135) indicate that:

*...with closed answers, the rate of error associated with transcribing numbers onto a coding sheet should be considerably less than one percent....The level of error will be lower...when those numbers are directly entered and 100 percent verified, so the transcription process itself is checked.*

When missing frequencies above the 1% figure occur, the original source is consulted and verification takes place.

Four main requirements for constructing question and response alternatives apply to questionnaire design, that:

1. they cover the whole range of possible answers
2. one and only one response is possible
3. a response is possible
4. the response elicits the information sought

As the questionnaire only employed *closed/fixed alternative* questions, each response was chosen from pre-coded response alternatives. Response options were, where possible, kept to the minimum and several followed the Likert (in Seiler and Hough 1970, variously) attitudinal scale of measurement. Simply put, the Likert scale requires the respondent to select a response from a five-point scale, one pole of which represents a positive (attitudinal) response

and one pole of which represents a negative (attitudinal) response. Positive and negative poles can be alternated, viz., 0-5 or 5-0, to avoid "stagnant" type responses. This alternating variation between positive and negative poles was utilised within the survey questionnaire.

Also, as the research criteria was primarily aimed at gaining quantitative material, the survey questions were carefully constructed so as to avoid vagueness, ambiguity, or the pitfall of "leading" the respondent. Leedy's (1993:192) warning that "The language [used in questionnaires] must be unmistakably clear in soliciting precisely what the researcher wishes to learn", and his (Leedy's) qualification that "Communication is a deceptive skill... which can be crystal-clear to you [the researcher] and meaningless jargon to another [the respondent]...", was given due consideration.

### **1.7.2 Reliability and validity**

The research surveyed 400 Pretorians and utilised a questionnaire relative to the aims of the study noted above. Systematic random probability sampling criteria was adhered to, in line with Stoker's (1989) *Survey Methods and Practice*. For practical reasons it was not possible to include every unit within the Pretoria municipal area and this method proved to be the most beneficial to achieve representivity. It is noted by Stoker (1989:100) that the reliability and validity of any survey is reliant upon a research methodology which provides every known unit (within a specific survey area) with the same chance of being included in the research, "...the aim...is to reach conclusions concerning the population as a whole...". Using the method of simple random probability sampling, which consecutively numbers every known element within the survey frame, each unit of the survey population has a known positive probability of being selected.

### **1.7.3 The pre-test**

A pre-test of 30 questionnaires was administered by the researcher herself in September 1993 at the University of South Africa. Knowledge gained from this pre-test was collated and discussed with research colleagues and field-workers prior to finalisation of the questionnaire used for the research. Language and question wording was given special attention and noted ambiguities were either removed from the questionnaire or re-worded/re-constructed.

#### **1.7.3.1 The pilot study**

*Leader* field-workers were later asked to conduct ten (10) interviews each within their areas before the research proper began, and these were discussed and checked fully before the main survey was conducted. The first 10 addresses from the area survey lists were given to field-workers, and they were sent into the field to complete the *quota* questionnaire. Four days in mid October 1993 were allocated for this pilot study, two weekdays followed by a weekend. All field-workers involved managed to keep to this schedule.

When all pilot study questionnaires were complete, a meeting was held between the field-workers and the researcher. At this meeting, each question was talked through to check its delivery and response (an earlier pre-test had considered language usage [see section 7.3]) and coding decisions were agreed upon. A lengthy discussion took place on how best to refresh a respondent's memory on the *hypothetical crimes* in section C of the questionnaire (section C of the questionnaire requests respondents to sentence criminal acts they had previously given seriousness scores to in section B). Short two or three worded refresher responses were agreed upon by all those present. For example, in order to remind a respondent of the *story line* for the act of terrorism question (B15), it was agreed that the field worker would say, "You remember, the Wimpy explosion".

Respondents who participated in the pilot study showed little difficulty in understanding the questions asked. Many respondents professed an interest in the study itself and one, a White Afrikaans policeman, asked to be informed of the findings of the research once it was complete. At this stage, no major problems were noted by either the researcher herself or the field-workers.

#### **1.7.4 The sections of the questionnaire**

The questionnaire was divided into four main sections dealing with respondent biography and fear of crime, seriousness attitudes, sentence choice and mitigating influence upon choice of sentence, and the decriminalisation of certain specific crimes. See Annexure "A" for a reproduction of the questionnaire (together with statute sentences) and a full resume of the questionnaire sections.

#### **1.7.5 The sampling method**

As noted earlier, according to Stoker (1989):

*...the aim of a sample survey is to reach conclusions concerning the population as a whole through statistical inference...on the basis of information obtained from the elements [or units] of the sample (1989:102).*

In this research the sample consisted of 400 (100 x 4 population groups) identified households, called the "units", and one chosen respondent from each selected unit called the "element". Briefly, the survey design required one hundred interviews from four chosen population groups, viz., White, Black, Coloured and Asian. (It should be mentioned that as a result of the apartheid legacy, residential areas in South Africa were segregated across racial lines.) The 400 interviews were divided evenly between the four population groups (rather than relative to population density), to avoid a bias weighting of any one group.

### **1.7.5.1 Simple/systematic random sampling**

The primary requirement for using simple random sampling techniques (explained more fully in Annexure "B"), is that a sample frame is available which lists all the elements within the target population. Each sampling unit of the population thereby has a known positive probability of being selected into the sample. The sample frame allows for every known element to be numbered consecutively to provide an ordered system from which a systematic random sample can then be drawn.

## **1.8 THE SAMPLE PROCEDURE**

### **1.8.1 Selection of survey areas: (primary sampling units)**

In line with the research criteria to survey Pretorians, only those living areas within the boundaries of the City of Pretoria were utilised. According to statistical data supplied by The City Council of Pretoria, the Pretoria municipal area comprises approximately 63,253 ha, and has, according to the 1991 census, a total population of 30 986 920. This total population is divided into four race groups: 5 068 110 Whites, 21 646 471 Blacks, 3 285 718 Coloureds and 986 620 Asians.

The White survey *population* was purposively selected in terms of lower/higher economic status related to housing suburbs around Pretoria - i.e. across lower/higher cost housing properties. Economic class distinctions (correlated to property price), were possible within the White areas because upper and lower class housing areas are, unlike other race group residential areas, well defined. The White "population" was so located, as to provide for a cross-section of "classes" within the White population in Pretoria.

The Black, Coloured and Asian survey *populations* used in the survey were selected for several reasons. Firstly, they fulfilled the main criteria of the research in that they were situated within the boundaries of the city of Pretoria. Secondly, they were well established group living areas known to house representative cross-sections of particular population groups. Thirdly, it was known that they were all well documented by Pretoria City Council (PCC) in the form of demographic housing maps. And, fourthly, taking cognisance of the above, they addressed the financial and administrative constraints placed upon the research in that they were known to have been surveyed recently by researchers and were, therefore, relatively familiar to field-workers. See Annexure "B" for a breakdown of how these selections were undertaken.

### **1.8.2 Selection of households within areas: (secondary sampling units)**

Systematic random selection of addresses (household) within chosen areas was used to select the sample "units". Thereafter, survey respondents ("elements") were identified using

the pre-decided research criteria (see questionnaire). In all areas the method of systematic random selection of addresses within extensions was used.

### **1.8.3 The sample frames**

The sample frames for the four housing areas used by the research were provided by the Pretoria City Council (PCC) in the form of demographic housing density maps for all areas within the boundaries of Pretoria. Every suburb/extension chosen for the research had at least one full-size map, whilst many areas had two or three. Of the 5 chosen White suburbs, Silverton was the largest and was represented by two full size and two half-size maps. Likewise, in the Black township of Mamelodi, extension 14 was represented by three full size maps. In Eersterust and Laudium (Coloured and Asian townships respectively), stands were larger than those in the Black township, and several extensions within each township were represented by two, sometimes three, full size maps.

Generally, the PCC maps were legible and in good condition. These maps allowed the researcher to successfully number adjacent stands consecutively to provide for an ordered system of sampling. However, there were one or two problems. Firstly, the maps were somewhat out of date and like every piece of research which uses the survey method, many hours were spent in physically checking street addresses and numbers before interviews began, in order to update the sample frame.

Quite a major problem occurred within the Black township of Mamelodi. Although the PCC maps identified street names, it became apparent that in many cases the street name signs were physically missing. Because of this, more information was required on addresses than merely a street name and number. Mamelodi also contains a number of male hostels and to avoid an all male bias, these "housing units" were purposively left out of the survey. Bearing these two factors in mind, the PCC maps were re-visited by the researcher, and street names and numbers were augmented with the additional information of either a zoning number or a section, a block identification, and a geographical area. For example:

No. 5846 Maake-Motuba Street became, No. 5846 Maake-Motuba Street, Block D4, Section Q, Mamelodi East.

Another difficulty was that, like many black townships throughout South Africa, Mamelodi has a fluctuating population. Houses can contain more than one family, or part of, and where maps denoted one stand indicating one household, a physical check would often find more than one family (denoting two households) living on that particular stand - sometimes a shack or shed had been erected at the rear of the main house wherein lived another family, usually a relative and his/her family. A decision was made that when this situation prevailed, the field

worker was to invoke the left/right procedure (detailed at 8.5 hereunder) to maintain a scientific approach.

#### **1.8.4 Selection sampling units: the method**

For each selected suburb or extension in a race area, adjacent households were numbered consecutively to provide an ordered frame. Then systematic sampling of households was undertaken. For example in the White area of Brummeria, the 167 units were assigned consecutive numbers. Since three households were required (see 8.2 above) every 56th house became a chosen household within that suburb, ( $56 = 167/3$ ). Stoker's (1989) random number tables were used to identify a start point for selection of the first of the three required households within Brummeria and, similarly, subsequent suburbs. Whilst, extension 3 in Mamelodi, the Black area, required 18 interviews and thus every 79th ( $1419/18$ ) household was selected from the frame using a random start point, thus allowing each element within the survey population the same initial chance (probability) of being selected for inclusion in the sample.

#### **1.8.5 Provision for problems**

Provision was made prior to sample selection (in accordance with research procedures) to attempt to plan for problems which might be encountered in the field, what Giddens (1992:662) refers to as "...unforeseen difficulties [which] easily crop up...at the point of actually doing the research". For example, where a *chosen* address was found not to contain a housing unit (house demolished or vacant), or no "family" were present, field workers were instructed to proceed first to the left of the given address and then to the right, until a response was obtained. Likewise, if a refusal to take part was received from a particular household.

#### **1.8.6 Tertiary sampling units**

The aim of the research was to interview a full cross-section of the Pretoria public: in terms of independent variables such as race, age, gender, and where possible, in terms of different professional, educational and religious involvement. To achieve this aim, field-workers were instructed to interview "The person in [the] household (above the age of 18 years) who will celebrate his/her Birthday next...". This sampling method ensured that different age groups and different role persons were enlisted to complete the questionnaire. Furthermore it ensured that not only bread-winners/head of households took part in the survey.

This scheme worked well within the White, Black and Coloured race groups. However, the Asian group posed a slight problem in this respect due, I propose, to the predominant patriarchal nature of Asian families. *Identified* Asian females (usually wives - *younger* Asian females appearing, in the main, more autonomous) sometimes declined to take part giving



reasons such as "the male head of the household handles all the paper-work". Once this problem had been highlighted, it was agreed between the researcher and the field-workers in question that, in such situations, if it was not possible to convince the *identified* respondent at the chosen address to participate, interviewers were to first seek the next "identified" in the chosen household according to Birthday, and so on. If all else failed, the field-worker was instructed to denote the household as non-responding and to proceed as described in section 8.5 above. At this stage no other major problems were encountered.

### **1.8.7 Data management: coding and re-coding**

According to Floyd and Fowler (1988:135), five steps must be undertaken to transform survey answers into data files for computer analysis. These five steps are:

1. Formatting or organising the data
2. Designing the code, the rules by which a respondent's answers will be assigned values that can be processed by machine
3. Coding, the process of turning responses into standard categories
4. Data entry, keying the data onto disc so that the analytic software can read them
5. Data cleaning, doing a final check on the data file for accuracy, completeness and consistency prior to the onset of analysis

The research process utilised these five steps.

The findings were initially keyed into the SAS (SAS Institute Inc. 1985) computer programme by personnel within the Department of Statistics at the University of South Africa. After the initial keying in process, frequency tables were run. At a later stage, some questions were re-coded to provide information of a more concise nature.

## **1.9 THE FIELDWORK**

### **1.9.1 The training of field-workers: their given directives**

According to Haralambos (1989:507), "Interviews are one of the most widely used methods of gathering data...[and] can be classified as 'structured' or 'unstructured', though many fall somewhere between these two extremes". As noted earlier, the research used a structured questionnaire format. Again, according to Haralambos (1989), this means that:

*...the wording of questions and the order in which they are asked remains the same in every case. The result is a fairly formal question and answer session.*

This format allows for what Haralambos suggests is an interview which is generally regarded as reliable because using the same wording and order for each respondent allows for a

greater likelihood that respondents will be *responding to the same stimuli*. When this method is employed, results can be tested more easily and knowledge gained is generally accepted as more reliable because, according to Haralambos:

*...different answers to the same set of questions will indicate real differences between the respondents. Different answers will not therefore simply reflect differences in the way the questions are phrased.*

Where possible this criteria was adhered to. However, it should be noted that, in the Black survey areas in particular, field-workers were often required to translate questions into the vernacular (home) language. A directive was given by the researcher, that in such cases, all effort should be made to retain the question meaning as closely as possible. Notwithstanding the above, it must be noted that language nuances are widely acknowledged as difficult to control.

In this respect Giddens (1992:669) notes that, fieldwork itself has to be acknowledged as being fraught with what might be termed "individual operational" problems - specifically here, knowledge of a particular home language. Also, he suggests that field-workers cannot just *be present* in a community; they have to gain some form of acceptance within the community and be able to minimise respondent feelings of intrusion. The field-worker must be adept at explaining and justifying the survey. Above all, Giddens suggests "...[they] must gain the confidence and co-operation of the community...and sustain it...if any worthwhile results are to be achieved". All field-workers involved in the survey lived within the particular area they were surveying and carried a letter of introduction. Such points were emphasised and discussed during training sessions.

Field-workers were all *regular* interviewers employed on a fairly frequent basis by the Bureau of Market Research at the University of South Africa. Three training sessions were undertaken, by the researcher with the field-workers, during October 1993, and the fifty (50) pre-pilot study interviews (conducted during the first week of October 1993 [see section 7.3.1 above]) formed the background for these training periods. Interviewers were instructed to:

- a) read each question to the identified respondent, provide response alternatives, and to note the answer given in the questionnaire booklet
- b) offer no opinion on content of questions
- c) elaborate on a question only where language understanding was problematic, and then only in terms of question content
- d) in no way improvise or alter respondent answers

- e) conduct their interviews during a three week time span, throughout the day, evening and across weekends
- f) note only the responses of the identified respondent (utilising the pre-decided provision for non-compliance set-up before the research start [see earlier at 3.4]
- g) revisit the chosen household as often as necessary in order to interview the identified respondent

Regular contact was maintained between the researcher and interviewers. Where possible, follow-up checks at interview addresses were made by the researcher herself, either by telephone or personal visits, to ensure that actual interviews were carried out.

### **1.9.2 The fieldwork proper**

Interviews in the 400 selected households were conducted over a three (3) week period during November 1993 (before the Christmas holidays began) and were completed in accordance with the time allocated. Each field-worker signed an undertaking to complete the allocated interviews on or before Tuesday 30th November 1993. See Annexure "C" for a copy of this undertaking together with a reproduction of the time table followed by the field-workers and the researcher. One field-worker in the Asian area failed to meet the completion date (due to having had to make a number of revisits to interview chosen respondents), and she subsequently delivered the remainder of her completed questionnaires to the researcher on Wednesday 31st November 1993, one day late.

### **1.9.3 Administration of the questionnaire**

The questionnaire took some 15 minutes to administer. Interviewers were trained to *unpack* the *hypothetical crimes* and *punishments* quickly. When respondents were asked to sentence the previously given seriousness crimes, they were reminded of the *hypothetical crimes* in pre-decided one or two word sequences (see section 7.3.1 above). This was done to a) refresh the memory and b) to avoid the interviewer entering into too much conversation with the respondent concerning specific crimes. Crimes were not dealt with in terms of *seriousness* and *sentence* at the same time (e.g. respondents were not asked to score a crime for seriousness and punishment at one and the same time), in order to provide a *check* on respondent answers.

### **1.9.4 Quality evaluation of data collection**

Finally, taking Oppenheim's (1979:24-49) advice, the researcher kept a close check with field-workers by telephone during the period of questionnaire administering. Oppenheim notes that such things as faulty recording and respondent evasiveness, amongst other things, can have a decisive effect upon the validity of a project. Unfortunately, even when

"close-checking" operated a field-worker covering the Coloured survey consistently recorded one question incorrectly. This inconsistency was only discovered during the coding stage, and resulted in a missing frequency of half the Coloured respondent responses for this question.

The problem appeared in section A2.7 (c) of the questionnaire where the respondent is asked to rate on a Likert scale of 0-5 "...the chances of the following event[s] happening to you...:-

*(c) That, if you own a vehicle, it could be stolen?*

Only the one field-worker - from a group of 9 - misinterpreted this directive, scoring the non-vehicle owner with a "N/A" response rather than treating the question in the positive as directed by the researcher during training sessions.. This resulted in a missing frequency of 50 responses.

## **1.10 STATISTICAL ANALYSIS**

### **1.10.1 Methods of statistical analysis**

This section briefly describes the statistical methods utilised during the course of data analysis.

#### **1.10.2 Descriptive methods**

Pie charts and bar charts are used to provide graphical summaries of data. Such figures have areas and/or heights proportional to frequencies in each category of response and thus provide for a good visual grasp of response patterns for discussion purposes.

Two dimensional tables, with each cell containing a proportion of responses, are used to summarise bivariate data for interpretation and subsequent discussion. No rigorous statistical tests were performed using the data in these tables since, invariably, frequencies within cells were not large enough to maintain the validity of such tests.

#### **1.10.3 Methods for data comparisons**

The following sections provide a summary of the three methods used for comparing groups of respondents, for example race groups, male and female, etcetera.

##### **1.10.3.1 Use of confidence intervals**

In Section B of the questionnaire respondents were asked to provide scores ranging from 1 to 5 to reflect their perception of the seriousness of each of the 22 listed crimes. The method of confidence intervals was used in order to compare the seriousness of crimes and thereby to

group crimes on the basis of these scores. The scores obtained were further utilised in Chapters 5, 6, and 7 to follow.

For each crime, an overall mean seriousness score  $\overline{X}$  and the standard error  $s$  of the mean were calculated as follows:

$$\overline{X} = \frac{1}{n} \sum_{i=1}^n X_i \text{ and } s = \frac{1}{\sqrt{n-1}} \sum_{i=1}^n (X_i - \overline{X})^2$$

where  $X_i$  represents the score from individual  $i$  and  $n$  is the sample size. A confidence interval is obtained by moving out from the mean, by multiples of the standard error, in both directions. Thus, to obtain a 95% confidence interval for the mean score above one would use the expressions below:

$$\text{lower limit} = \overline{X} - 1.96 \frac{s}{\sqrt{n}};$$

$$\text{upper limit} = \overline{X} + 1.96 \frac{s}{\sqrt{n}}$$

where 1.96 represents the 95% percentile of the normal distribution; assuming the sample size ( $n=400$ ) is sufficient to render valid the use of the normality assumption.

According to Blalock (1985:211) "...the procedure [for obtaining a 95% confidence interval] is such that in the long run 95% of all such intervals obtained will include the true (fixed) [value of the] parameter...", in this case the mean seriousness score. Thus it is possible to compare mean scores for all crimes by investigating whether the confidence intervals overlap or not. In cases where there is no overlap between two such intervals, it can be concluded that the mean scores for those two crimes are likely to be different, thereby providing a method for grouping the crimes into broad categories for input into the sentencing debate.

#### 1.10.3.2 Chi-square tests for comparing proportions

According to Blalock (1985:279), the chi-square tests "...can be used whenever we wish to evaluate whether or not frequencies...differ significantly from those which would be expected under a certain set of theoretical assumptions...". Thus, for example, such a test can be used to ascertain whether proportions of respondents, in different racial groups who were victims of a particular crime, are in fact statistically significantly different.

The simplest form of the chi-square test compares observed and expected frequencies for each cell in a two dimensional table of frequencies. Suppose a two way table of observed frequencies  $f_{ij}$  ( $i = 1,2$  and  $j = 1,2$ ) is obtained as

	A	B
I	$f_{11}$	$f_{12}$
II	$f_{21}$	$f_{22}$

and one wishes to test the null hypothesis of no differences between proportions in populations I and II with respect to characteristics A and B. The expected frequencies for each cell are obtained as

$$(\text{row total} \times \text{column total}) / (\text{total number})$$

so that, for example, the expected value for the first cell is given by

$$e_{11} = \frac{(f_{11}+f_{12})(f_{11}+f_{21})}{f_{11}+f_{12}+f_{21}+f_{22}}$$

The chi-square statistic is then calculated as

$$\chi^2 = \sum_{i=1}^2 \sum_{j=1}^2 \frac{(f_{ij} - e_{ij})^2}{e_{ij}}$$

The larger the value of this statistic so the larger the difference between observed and expected values. In order to test the null hypothesis of no difference between population I and II, the value of the statistic is compared to the theoretical chi-square distribution and, if it is sufficiently different, it can be concluded that there are in fact differences between populations I and II in respect of characteristics A and B.

### 1.10.3.3 Models for binary data

Binary data is that wherein each observation can be classified into one of two groups, for example success or failure. The expression "grouped binary data" refers to situations where there are proportions of respondents answering "yes" or "no". When a binary response is recorded for individuals differing from each other on the basis of a number of other variables such as age, race, marital status, etcetera, the use of chi-square methods presented in 10.3.2 above will generally produce results which are extremely difficult to interpret due to multi-dimensional interactions between these base variables. An alternative approach is to construct a statistical model to extend these methods.

Collett (1991:43) notes that "The basic aim of [statistical] modelling is to derive a mathematical representation of the relationship between an observed response variable and a number of explanatory variables, together with a measure of the inherent uncertainty of any such relationship". The simplest statistical model can be expressed as follows:

$$\text{response variable} = \text{systematic component} + \text{residual component}$$

In the model the systematic component summarises how the variability in the response of individual sampling units is accounted for by the values of certain variables, or the levels of certain factors on those sampling units. The residual component - the remaining (unexplained) variation - summarises the extent to which the observed response deviates from the average or expected response as described by the systematic component (in Collett 1991: variously). In a satisfactory model the systematic component will account for much of the non-random variation in the response.

Suppose as in 10.3.2 above, one wishes to compare the frequencies of observations in each cell of a two way table, where now the cell entries are expressed as proportions  $p_{ij}$  of responses in that cell, and A and B represent binary response options..

	A	B
I	$p_{11}$	$p_{12}$
II	$p_{21}$	$p_{22}$

The linear logistic model takes the form

$$\text{logit } p_{ij} = \log_e \frac{p_{ij}}{1-p_{ij}} = b_i + c_j + e_{ij}$$

where the (unknown) parameters  $b_i$  and  $c_j$  represent the row and column effects in the table above and the  $e_{ij}$  represents the residual or error component. The transformation of the proportions  $p_{ij}$  to the logarithmic scale moves their values from the range 0 to 1 to an infinite range, thereby enabling greater flexibility in estimating the parameters and their standard errors.

The modelling process estimates values for the unknown parameters by means of maximum likelihood methods as provided for in many modern statistical computer packages (see Collett 1991:57-58). Once the parameters have been estimated the "fitted" values for the proportions  $p_{ij}$  can be calculated and compared to the observed values in order to obtain a measure of the goodness of fit of the model obtained.

The most common technique for measuring the discrepancy between observed and fitted values from logistic models is by means of a statistic called the deviance (see Collett 1991:62) which is based on likelihood ratios. Provided the numbers of observations in each row and in each column of the above table are sufficiently large, the deviance can be assumed to approximate the chi-square distribution and thus used to assess the model fit. If the deviance is much larger than the theoretical distribution, it can be concluded that the model is not fully suitable. Similarly, one can assess the need for each explanatory variable in the model by assessing the amount of deviance attributable to that variable in relation to the chi-square distribution.

## 1.11 THE CHAPTERS

### Chapter 1: Introduction

Chapter 1 provides an overview of the study by reviewing relevant literature on the sentencing debate, using the ensuing discussion to justify the inclusion of public involvement within the juridical arena on sentencing policy. The chapter argues the benefits of public input into sentencing by suggesting that punishment should reflect the wishes of the general public. The chapter then moves on to consider the aims and rationale for the study, the research methodology and hypotheses, the definition of key concepts, statistical analysis etcetera, and concludes with a brief resume of the chapters within the study.

### Chapter 2: Historical theories of punishment

Chapter 2 builds on various ideas and concepts identified within the introductory chapter. It traces the Classical, neo-Classical, Positivist and Utilitarian theoretical models of punishment into contemporary developments within the field of sentencing, using the ideas of various contemporary academic writers, for example Doob, (1993), Faulkner, (1993), Tonry (1992), Van Der Merwe (1991), and Walker (1991), to highlight the oscillations in sentencing policy. In doing this, the chapter considers the evolution of what might be called the punitive philosophy of utility, from the more rehabilitative efforts of the Classical school. The chapter argues that contemporary penal theory is at a critical point of change, and suggests that the ideology of sentencing practice is, once again, returning to a more punishment oriented mode of operation. This so-called *return* is justified within the chapter in relation to, amongst other concerns, the perceived dramatic rise in the universal rate of crime and the publics' call for harsher, more punitive, punishment measures.

The chapter discusses the effects of the Human Rights movement on global penal policy, and uses the work of Tak (1994) and The Dutch Code of Criminal Procedure concerning police apprehension and remand detention in the Netherlands, to highlight the ideological changes taking place. The chapter argues that *root* theoretical models and the Human Rights movement (seen in practice within the Dutch example) are diametrically opposed. This oppositional position suggests that punishment and sentencing have oscillated from one end of a continuum to the other, i.e. from punitiveness (just-deserts) to the indeterminate (rehabilitation/medical model), but argues that due to various *pressures*, the call for a harsher sentencing is once again forcing a return to the more mandatory, punitive (just deserts) philosophy of sanctioning offenders.



Chapter 2 then moves on to look at the purposes of punishment by discussing the theoretical underpinnings of concepts like retribution, deterrence, rehabilitation and crime prevention. Utilising the work of, for example, Walker (1991), Cross & Ashworth (1981), and Lord Longford (1991), the discussion of these concepts revolves around the rights of society as opposed to the rights of the individual.

Finally, the chapter briefly considers the sentencing policies of the United Kingdom (U.K.) and the United States of America (U.S.A), in an effort to understand how the same theoretical/ideological platform has brought forth two distinctly variant criminal justice platforms, viz., what might be referred to as the liberalism of precedent as opposed to the mandatory philosophy of guideline grid.

### **Chapter 3: Theories of punishment in South Africa**

In chapter 3 the theory and ideology behind sentencing policy in South Africa is taken up, using the ideas put forward in chapter two as a basis for discussion. The chapter examines the historical formation of ideology within South African sentencing, with reference to the work of, amongst others, Hahlo & Kahn, (1960), du Plessis & Kok, (1981), Van Der Vyver, (1988), and Van Der Merwe, (1991). The chapter builds upon the ideas expressed in chapter 2 to show how the South African legal system has been influenced by ideological trends in sentencing from other criminal justice jurisdictions.

### **Chapter 4: An evaluation of the different forms of punishment**

In chapter 4 the emphasis is on the examination of sentencing sanctions. The chapter discusses specific punishment regimes against the inherent problems within the sentencing forum as a whole, for example, the rising crime rate, dissatisfaction of both juridical personnel and the public with sentence options, prison overpopulation and costs. The chapter debates the views of several prominent authors on specific punishment sanctions, for example, Duffee & McGarrell (1990), on community corrections, Feeley & Simon (1992), on what they call the new penology, Koehler & Lindner (1992), on alternative (to incarceration) sanctions, and Terblanche (1993), on the fine, and considers the inevitable trade-offs involved with implementation of alternative punishment sanctions.

### **Chapter 5: The findings: biographical profiles/victims of crime/fear of crime and seriousness scores**

Chapter 5 deals with the first two sections of the research findings, viz.. respondent biographical profiles, the victims of crime and the fear of crime, and respondent seriousness scores. The chapter *unpacks* the knowledge gained from the research component, and presents the finding with reference to both theoretical models and literature. The chapter provides statistical correlation of the most salient findings within the text, presented variously

in the form of tables, pie charts, histograms and graphs. The chapter then moves on to consider respondent seriousness scores in the light of both theoretical and ideological philosophy on punishment, utilising where applicable, the findings of the British Crime Survey (and others) to provide correlative knowledge to place alongside the findings of the South African research,

#### **Chapter 6: The findings: sentencing scores/mitigating effects/decriminalisation**

Chapter 6 deals with respondent sentencing scores, the effects of mitigating circumstances and decriminalisation. The chapter *searches* respondent sentencing preferences in the light of both theoretical and ideological philosophy to justify the relevance of public involvement in juridical sentencing practice. Once again, the findings of the British Crime Survey (and others) are utilised for comparative purposes, and where appropriate, statistical information on respondent sentencing choice with regard to (specific) *mitigating effects* is provided. The chapter then moves on to report respondent views on decriminalisation of certain *crimes*. The chapter provides statistical correlation of the most salient findings within the text, presented variously in the form of tables, pie charts, histograms and graphs.

#### **Chapter 7: Recommendations**

Chapter 7 begins by offering a précis of the thesis chapters and then moves on to debate various methods of crime prevention and diversion. Using the Dutch method of composition as a guide, the chapter debates various ideas on diversionary procedure aimed at preventing crime. Chapter 7 then attempts to offer recommendations in relation to the statistical analysis of findings undertaken within chapters 5 and 6, in terms of public opinion on crime and sentencing, and provides a South African *sentencing guide*. In attempting to recommend, the chapter draws together various elements and ideas from throughout the thesis.

### **1.12 CONCLUSION**

In this chapter the study has been introduced with a brief discussion of the sentencing debate, statement of the problem, motivation for public involvement, aims of the study, methodology, research hypotheses, statistical analysis and definition of key concepts, via a cursory overview of the thesis chapters. In Chapter 2 to follow, the historical theories of punishment which have *informed* sentencing policies and practice within various juridical arenas are debated.

**CHAPTER 2**

**HISTORICAL THEORIES OF  
PUNISHMENT**

## CHAPTER 2

# HISTORICAL THEORIES OF PUNISHMENT

### 2.1 INTRODUCTION

In the previous chapter the inherent problems of sentencing were briefly outlined and a case was made out for the South African public's wishes to be incorporated into the sentencing policy arena in the country. It was shown that Government, as a democratic body acting for and on behalf of *the people*, can only attain *true* legitimacy, when it is seen to be accountable to the moral will of the governed; what Adinkrah (1991:230) referred to "as a reflection of the basic values of each individual citizen". Likewise, it can be argued that this so called *arena*, is a reflection of the inherent historical theories of punishment, what Van Der Merwe (1991:1-6) calls the "justification for", and "purpose of", punishment itself. This notion can be argued to encompass both the concept of a public sphere (as intimated above) and a theoretical sphere, which in this case has to do with what Van Der Merwe's (1991:1-8) terms the "...theoretical underpinnings of the justification for punishment held by a particular individual or group".

In terms of the theoretical sphere, Van Der Merwe (1991:1-6,7) argues that theories of punishment can be thought of in many different senses. For example the concept of deterrence, which presents itself in all theories of punishment, primarily means to prevent. To prevent crime from happening is a primary aim of every theoretical school of thought, but according to Van Der Merwe the *aim* cannot *justify* the punishment in exclusion of what he says is the "innate moral content" of the law itself (1991:3-2). He indicates that for his part, concepts like deterrence are bound to the purpose and aims of punishment, whilst concepts like justification and theory need clearer definition. Van Der Merwe's (1991:1-6) argument is that he believes "punishment itself is a moral concept". Van Der Merwe (1991:1-7) suggests that criminal law has to be:

*...inherently moral... punishment is essentially justified as the moral reproach of the community, as symbolised by the court. Whether private or domestic ethics, public morality or punishment are called for, depends on the position of the offender on a scale of punishability...*

In addition, Van Der Merwe's argument is that there is a distinction between what he terms "qualified" and "unqualified" punishment (1991:1-8). He says there has to be certain "preconditions" which the offender has met - for example was the criminal act intentional or,

was only part of it so - before an individual may be punished. In other words, just how morally blameworthy is the offender? This is an interesting, and indeed a difficult idea to understand, because any answer involves a philosophical standpoint. Difficulty in understanding, is furthered by the author's usage of the ideas of Letwin (in Van Der Merwe 1991:3-2), who criticises the "...moralists (or believers in a 'superior' law) who have only an instrumental view of morality..." because this leads to a "failed understanding of moral authority". Van Der Merwe (1991:3-2) says that to bring these ideas into focus one needs to consider the historical development of theory, paying particular attention to the emergency of what he terms an "instrumental" morality. Therefore, before moving on to the development of theories in criminology, a brief notation concerning morality and the law is necessary.

Van Der Merwe (1991:3-2) indicates that "...the whole controversy between positivists and normativists over law and morality has been the result of failure on both sides to understand the idea of authority". Very simply, he says that criminal law involves two types of morality. He argues that there is a different morality involved between the ethics of the law, which he terms "...a set of standards for conducting oneself" (1991:3-3) and the more positivistic morality which has to do with "...the code of conduct adopted as right and proper in a particular country at a given time" (1991:3-4): the instrumental morality of the law. He links these two moralities by stating that:

*...effective law should have an innate moral content which consists of more than the natural hesitancy to break any law.... [This] natural hesitancy... [is the element which] actually gives a moral content to positivism in the sense that there are certain values in maintaining law and order (1991:3-2).*

As historical stepping-stones, it can be said that theories of punishment grow from, and are in turn internalised within, the cognitive understanding of all people: both those who govern and those who are governed. In this respect Lord Denning (in Hall 1987:143) indicated earlier that "The great tides and currents which engulf the rest of men do not turn aside in their course and pass the judges by". Therefore, it can be argued that theories do not develop in a vacuum, but are rather reflections of particular ideological standpoints which evolve at one and the same time within a historical period and a particular criminological sphere. Cohen (1981:220) notes that:

*The development of social scientific theory and knowledge takes place not just within the heads of individuals, but within particular [historical/criminological] institutional domains. These domains, in turn, are shaped by their surroundings.... In criminology, an understanding of these institutional*

*domains... is situated...in the applied domain of the state's crime control apparatus .*

Therefore, this chapter researches the historical ideological pillars of punishment by seeking knowledge of the foundations on which particular sentencing policies have been built. The aim within the first section, is to look at punishment in terms of various early theoretical schools of thought. The chapter then moves on to consider the human rights movement, in relation to the work of the United Nations, and the formation of The United Nations Interregional Crime and Justice Research Institute (UNICRI). By searching for the basic foundations of particular schools of theory, and juxtaposing their theoretical ideals with contemporary movements like the human rights movement and just deserts, it is possible to indicate a change in the theoretical standpoint which informs the underlying principles of modern sentencing policy. The chapter then moves on to look briefly at four broad concepts found in all literature concerning theory and sentencing practice, namely, retribution, deterrence, rehabilitation and prevention, and tries to place these into the theoretical debate.

In the second section of the chapter, the initial discussion is built-upon in order to uncover the historical foundations of punishment and sentencing practice within the United Kingdom and the United States of America.

## **2.2 THEORETICAL SCHOOLS OF THOUGHT**

Theories, or schools of thought can, for the purpose of debate, be argued to fall into two definite camps; i.e., root theories for example Classicism, Positivism, Utilitarianism and Marxism, and contemporary theories, for example neo positivism, feminism and critical theory. Each theoretical camp has defining boundaries (more often termed paradigms). For example Marxism deals with the unequal distribution of the means of production and wealth in its pure form, and via extrapolation, with the unequal distribution of justice (or power) in the criminological sphere. And, just as Marxism can be extrapolated from an economic sphere into a criminological one, so can critical theory or feminism be argued to transform or extend the constraints of existing theoretical paradigms. Having suggested such a distinction, one needs to understand that theoretical schools are not mutually exclusive, they "build on and borrow from each other" to form other theoretical philosophies (see also section 2.1 below).

In considering crime, theories tend to argue from oppositional poles, either biologically or sociologically determined, with the concept of indeterminism weaving its influence throughout. Root theories invariably take-up this *debate*. For the purpose of the study at hand, the researcher chooses to confine herself to the so-called root theories, making reference to contemporary theory only in passing in the belief that the foundations of sentencing practice primarily lie within this philosophical ambit.

### 2.2.1 The Classical School

Bartollas (1985:60) says:

*The punishment model is as old as history itself, for the belief has been fixed from the earliest written records that criminals must be punished.*

It is noted that the writings of the Greek philosopher Plato variously upheld the notion that punishment of the individual wrongdoer is both good for society and the individual. Using Socrates as a voice, Plato indicates that:

*...money-making rids us of poverty, medicine of sickness, and justice of intemperance...because a just penalty for wrongdoing disciplines us... makes us more just and cures us of evil (Protagoras, The Collected Dialogues of Plato (1961, in Bartollas 1985:60).*

The earliest accounts of punishment for wrongdoing show that during the Middle Ages sentencing was brutal in nature, often delivered by way of torture and death (usually for menial crimes), and was upheld by a religious dogma which advocated the notion of an eye for an eye. This inhumane doctrine held that wrongdoing offended not only society and the individual, but also the gods. Classical theory evolved as a reaction to inhumane punishment regimes and was, according to Snyman (in Cloete & Stevens 1990:6), the first theoretical attempt to develop a systematic process of crime control.

Beccaria (1738-94) is widely accepted to be the founding father of the Classical school, doing much during the eighteenth century to rid punishment of its inherently brutal and sadistic elements. According to Young (1981:253), Classical theory was the philosophical *vehicle* of the Enlightenment and Soma (1982:28) suggests that "The emphasis placed upon deterrence by the Classical theorists derived strength from the underlying element of retributive appropriateness". The Classical school set out to replace the brutal and sadistic elements of punishment with a method of punishment which did not merely inflict pain upon an offender, but aimed for the first time at prevention and deterrence. Young (1981:253) goes as far as to suggest that:

*Within a hundred years, most of the legal and penal systems of administration in Europe had been thoroughly remodelled in the light of classicist principles.*

Enlightenment thinkers proposed a legal system which had its roots in the concept of a free and legal contract between free and equal individuals. The contract centred on the sovereign individual (identified later as different from the sovereignty advocated by the human rights

movement). Beccaria's approach called for laws which formed what might be called a code within which individuals were required to act. Any deviance from the pre-defined code resulted in a punishment which was both specific and unambiguous. In other words, a punishment which was as a direct result of the crime committed. No recourse was permitted in terms of the wrongdoers reason or circumstance in having breached the code. The code provided for a joint responsibility between society and the individual. It offered a set of legislative laws which, once set up, were non-negotiable. Legislation was built upon what became known as the happiness principle, individual judgements were to be directed towards the goal of achieving the greatest happiness for the greatest number. Thus, the unhappiness of one offender could not weigh-up against the happiness of all those deterred from crime by his/her example.

The backbone of the happiness principle was the idea that punishment had to inflict more pain than the pleasure or advantage an infringement of the code might provide. Beccaria argued that responsibility of actions had to be linked to the human ability to use one's own free will to distinguish between right and wrong. Classical theory is, therefore, indeterminate, because it places responsibility/autonomy upon people to determine (or choose) their actions. Van Der Merwe (1991:1-2) says that "Those who subscribe to this premise also feel they have a right to expect a responsible choice...". But such an assumption assumed that people were equally able to resist temptation and would react in equal fashion to the same punishment, and, even more to the point, the assumption was made that people bear equal responsibility for their acts. The law held people responsible for their actions, and Beccaria argued that one of the main contentions was the need for laws which rather than merely meting out punishment upon an offender in direct response to a criminal act (a purely retributive act), the law had also to aim at preventing crime. With this in mind Beccaria argued for a policy of law enforcement which was impartial and non-discriminatory, a law which tried to educate offenders to mend their ways in order to uphold the contract. This way of thinking led to a "fixed tariff" form of punishment which dealt primarily with the criminal act itself. However, Soma (1982:29-30) points out that fixed tariff penalties allowed for no arbitrary punishments or discretion in terms of the individual offender. He says:

*In the assessment of punishment only the objective injury of the crime was considered without reference to the personal disposition of the criminal. It was assumed that those guilty of the same crime must have been equally free agents and, therefore, equally responsible. Consequently they should suffer equal punishment.*

Later, the neo-classical school did redress the concept of total free will and responsibility for actions, conceding that not all individuals were equally able to make right choices - the insane



for example. Neo-classicists also admitted that the absence of premeditation should have a bearing on punishment, acknowledging that various circumstances could be seen to limit the offender's ability to exercise freedom of will. From this beginning grew the theory of Positivism. Positivism dealt in facts and, for the first time, shifted emphasis from the crime (the act) to the offender.

### 2.2.2 The Positivist school

Advocates of the positivist school, for example Lombroso, Ferri and Garofalo (primarily recognised as the pioneers of positivism and regarded by many as the instigators of modern criminology) focused for the first time upon the offender rather than the crime. Stevens (1990:23) says that:

*This change of approach was assisted by the development of the natural sciences as a result of **inter alia** the contributions of Darwin, the influence of the social sciences through the work of people like Comte and Spencer....[A] logical outcome of the development that took place in these spheres was their application to the etiology (causes) of crime...[which] had to be sought in clearly defined facts...there was a strong emphasis on the physical and biological characteristics of man and the environment in which he function[ed].*

As Stevens points out Positivism applied an analytic reasoning which sought the cause of crime in clearly defined facts, leading to what Van Der Merwe (1991:2-8) calls "The theory of cause and effect [being]... applied to crime and criminals". In Chapter 3, section 3.3.1 [p76] to follow, Nicolson (1992:65) identifies positivistic philosophy as the doctrine which enabled the pre-Constitution South African judiciary to hide behind statute rather than face moral issues. Whatever, Positivism aimed to offer a scientific theory which dealt in the causal relationships between observable phenomena. However, it might be argued that causal relationships tend to have underlying mechanisms which do not readily lend themselves to scientific (or analytic) detection.

If one considers, for the purpose of debate, that on a particular level Classical theory and Positivistic theory form divergent poles in criminological thinking - punishment of the criminal act is punishment of the criminal according to the facts, then one may be able to suggest that Utilitarianism - although it evolved as a reaction to Classical thinking - forms something of a bridge between the two theories.

### 2.2.3 The Utilitarian Ideal

According to Walker (1991:6):

*...utility... is the reduction of the frequency with which people infringe the laws and rules...It contributes to this by deterring the offender from re-offending [and] discourages others from following his example, or putting him where he cannot offend any longer.*

Utilitarianism saw people as influenced by social, psychological and biological factors which restricted, or impinged upon, their free choice. In line with its deterministic principles, people were not completely free agents who made totally free choices, they were party to restrictions in choice brought about by their personal characteristics and their presence/place in society. Utilitarians argued that people could not be held totally responsible for criminal actions.

Here then is an oppositional view to *pure* classical theory which at the same time provides for the analytic reasoning inherent in Positivism. What this oppositional view meant for the offender is, according to Soma (1982:69), that the offender is held to be accountable (rather than responsible) for his actions, not because he has freely chosen to be a criminal but because he has in him the forces that cause him to be a criminal. This is not to say that people have no will, but that that will can be influenced by diverse forces (the underlying mechanisms/facts of observable phenomena). Utilitarianism embraces Classical philosophy in its recognition of humans as rational beings who utilise their free will and choice to achieve goals, i.e. the individual utilises that action which brings forth the most pleasure and the least pain. Accordingly, Utilitarianism accepts Bartollas's (1985:62) classical proposition that if punishment is appropriate - if punishment outweighs the advantages derived from a criminal act - it can deter it. The main objectives were to prevent all possible offences, to persuade those who chose to commit an offence to commit a lesser rather than a more serious one, and to prevent crime at as cheap a rate as possible.

Cross & Ashworth (1981:139) call this a denunciatory or educative theory because the goal was to deter a re-offence and to persuade others against following unlawful examples. Thereby, the ideals of Utilitarianism joined forces with the Classical school to provide a philosophy for punishment which advocated that: sanctions should outweigh the rewards of crime, that they be proclaimed in advance of use, that they be proportionate to a criminal act, that they be equal for everyone and, that they ensured the individual was judged by the law in terms of a specific wrongdoing (act).

#### 2.2.4 Contemporary developments

According to Bartollas (1985:63), Mabbott's writings on the morality of punishment in 1939 questioned the Utilitarian ideals by juxtaposing their social advantages against the deprivation of personal liberty - which Lord Longford (1991:187) suggests involves a purely retributive utility and argues that it is impossible to measure "... the moral guilt of someone who has broken the law". Seen in this way Utilitarianism can be shown to highlight some of the problems inherent in the just desert philosophy of punishment which today appears to be growing in favour. Just desert advocates believe that any criminal act deserves to be punished, and the belief in individual free will and choice is broadened to embrace individual autonomy, rationality and responsibility when the action to choose is exercised. (Here is noted something of a return to classical thought.) Bartollas (1985:63) says that"

*Just desert advocates, such as David Fogel and Andrew von Hirsch, question the utility of punishment as a means of deterring crime and support the use of punishment only because those who commit crime deserve to be punished.*

Lord Longford (1991:188) says that, "...retribution is bound up with deterrence and reform because neither deterrence nor reform can perform their task adequately unless the penalty is felt to be just". He says, however,:

*I still feel...that retribution has acquired such unpleasant associations that it is high time a different word replaced it. Today, 'just desert' is in vogue. I prefer 'fairness'.*

It can be said that the ideological philosophies discussed above have considerably informed the theoretical underpinnings of criminal theorising, broadly spanning the classical and determinist philosophies over time (from Beccaria and Bentham [18th century] to Fogel and von Hirsch [20th century]). However, theory is not this clear. Polemics, whilst they serve to define boundaries do not preclude other sub-theories existing. As with all theorising *truth* is elusive, and theories continually build on, and borrow from, each other. In this regard Radzinowicz (1966:102) argues that any one single school of thought "...[does] not lead very far when it comes to the consideration of particular measures", suggesting that modern societies are "...differentiated and have to deal with changing moralities": they are, in his words, "less coherent" than past societies. He suggests that:

*The criminal law cannot be a rigid reflection of any single standard.... What is needed in deciding issues of criminal law is the sort of careful balancing of the advantages of a measure to society and to the individual that is proper to any other measure of public policy... (1966:103).*

Radzinowicz (1966:103 & 104) emphasises this point by showing how criminal law has had to evolve in two different directions, which whilst it does not negate polemics, does in fact blur the edges sufficiently well to acknowledge the argument for "careful balancing" of punishment and sentencing. In this respect he notes:

*There has been its (the criminal law) extension for such purposes as protecting the weak from exploitation, neglect or cruelty and securing the positive benefits of the welfare state. At the other extreme there has been a continued decline in the enforcement of laws concerned with private morality (decriminalisation), especially in the sexual sphere. Here the tendency is for the criminal law to contract, since these aspects of behaviour are no longer considered to imply any great social danger.*

It may be true to say that this balancing of the criminal law is in no small part due to the various movements in modern society towards the rights of individual citizens to voice their opinions and act out their personal choices. Examples are the feminist and gay movements and even movements like Greenpeace, all of which began as non-official attempts to make an input into areas of public concern. People are no longer content to be secure within an *official* group identity. The individual voice is today a powerful movement and denoter of society's rules and policies. The individual has a right to his/her rights: to decide what society's needs are. This is no better borne out than in the area of crime. Judiciaries throughout the world are now required to adopt policies of addressal which take public wishes into account. As noted earlier in Chapter 1, crime in society is politically visible and legislators and judiciaries need to have an eye on the public audience. Movements like those mentioned above, can be argued to form something of an oppositional position to the ideas put forward at the start of this chapter. In terms of theoretical influence, the international human rights movement has had a considerable impact on juridical policy-making and it should prove informative to look at how this impact has come about.

### **2.2.5 The United Nations human rights mandate: its relevance for theory**

The human rights movement, in relation to crime control, can historically be seen to flow directly from The Declaration of the Rights of Man encapsulated in the ideals of the French Revolution. According to The United Nations publication (1991:3, author un-denoted) on crime prevention, this was the first:

*...attempt to formulate universal standards for the protection of individuals...[but it] lacked the world-wide consensus required of a truly international approach to...[crime] control....*

Preceded by the International Penal and Penitentiary Commission (IPPC), the United Nations (1991:5) "...was barely ten years old when the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders was convened in 1955 at the Palais des Nations in Geneva". The focus at this first congress was narrow: it covered the treatment of offenders held in custody and the problem of juvenile delinquency. In accordance with resolution 415(V), the United Nations continued the IPPC practice of convening every five years in order to draft formal documents (instruments) as models of action within the crime sphere termed United Nations standards, guidelines and international instruments. Of the many such instruments provided by this body, most relate to the protection of individual human rights. For example, Resolution 663 C1 (XXXIV) relates to the standard minimum rules for the treatment of prisoners (1991:53), and Resolution 1984/50, to the protection of the rights of those facing the death penalty (1991:64). In this respect it is also noted that U.N. instrument models (1991:11) invariably point to:

*...important question[s] involv[ing] striking a balance between the twin exigencies of crime control and justice. On the one hand, improvement is called for in protecting the rights of those accused or convicted of crimes, with the ultimate goal of eliminating arbitrary arrest and detention, corrupt or biased courts and brutal treatment of offenders held in the custody of criminal justice systems. On the other hand, recent United Nations Congresses have stressed the rights of victims of crime to protection under the law and, in some situations, to redress or restitution. Effective law enforcement and fair criminal justice systems are a bulwark protecting the rights of people to a secure existence in order to develop...*

The United Nations mandate, linked to the Charter and the Universal Declaration of Human Rights,:

*...reaffirm[s] faith in fundamental human rights, in the dignity and worth of the human person...[and to] promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion (1991:28).*

Taken into the realms of human rights in the administration of justice, this mandate argues that the proper functioning of any criminal justice system is due respect for the rights of the individual. The mandate, amongst various other rights, calls for the equality of all persons before the law, the banning of arbitrary arrest, detention or exile, promotion of the rights of anyone charged with a penal offence to be presumed innocent until proven guilty by a fair

and public trial at which he/she has had all the guarantees necessary for his/her defence and, it decries the use of inhuman or degrading punishment (1991:33).

The United Nations Interregional Crime and Justice Research Institute (UNICRI) came into being in May 1989. Originally conceived as the research arm of the United Nations criminal justice programme, the Institute's work has expanded and now not only undertakes research, but also training and certain field activities (1991:43). UNICRI's current work includes projects on:

- Crime and development

- Sentencing policy and practice, with emphasis on alternatives to imprisonment

- Crime prevention and social control

- Environmental crime

- Juvenile delinquency and juvenile justice

- Drug abuse prevention and control

- Economic crime

- Training courses in research methodology

- Training courses for judicial personnel and social operators

According to Alston (1992:1), projects like these aim to further the United Nations dominant concern which, according to the 1990 Annual Report on the work of the organisation by the then United Nations Secretary-General (in Alston 1992:Preface), is to "... engage itself in elaborating human rights...[by] establishing bench-marks against which standards of behaviour can be measured".

Returning to the theoretical philosophy of the United Nations mandate for human rights and the law in terms of Classical theory, it is apparent that in its pure form Classical theory is at variance with the rights of the individual as denoted by the mandate. The social contract within Classical theory, although it takes up a joint responsibility between society and the individual, provided legislative laws which were non-negotiable. The individual in possessing free-will, took responsibility to act in compliance of the ruled system (the contract), but once the ruled system was breached, punishment was handed down in direct response to the crime with no regard for the circumstance (or rights) of the individual offender. This point was noted earlier in Soma's (1989:29) words as an assessment of punishment which took only the objective (positivistic/facts) injury of the crime into consideration. Looking at Utilitarian theory, and bearing in mind what was said earlier concerning social, psychological and biological factors which restrict free choice in relation to a criminal act, one might again argue that in certain respects the theory is at variance with the U.N. mandate concerning individual human rights. Even admitting the provision that free choice could be influenced by certain factors

(thereby not representing a truly free choice of action), there is still the inference that choice should be made in a certain way - Cross and Ashworth's (1981:139) point that Utilitarianism is a denunciatory or educative theory is relevant here in that it suggests that individuals renounce liberty "for the good of all (society)". The individual is still expected to act in society as Mabbott (in Bartollas 1985:63) indicated earlier, in relation to the "social advantages" as opposed to individual "personal liberties". Seen in this way, both theories can be suggested to view the individual in terms of what might be called a subservient position in relation to society: Classical theory places the social contract uppermost, whilst Utilitarianism identifies the pursuit of the greatest good for the greatest number as its primary principle, denoting individual existence as geared to the maintenance of society rather than the promotion of respect for individualised fundamental freedoms.

Alternatively, human rights, as defined by the United Nation's mandate is concerned with individual fundamental rights to freedom and dignity and, furthermore, the right to life, liberty and security of person. The import of these provisions cuts in two directions, namely, "...the right of the people of the world to enjoy domestic tranquillity and security of person and property without the encroachment of criminal activity", and the "... predicat[ion of] efficient criminal justice systems that do not deprive citizens (even wrongdoers) of their rights:" (1991:28,29).

It is true to say that all philosophy contains a thread of idealism. With reference to crime, that idealism is aimed at making society a better place for people to live. The idealism which motivated the earlier schools of theory discussed above has not changed with the advent of human rights, what has changed is the direction in which that idealism has moved. At the present time penal policy stands at something of a watershed, wherein the promotion of individual rights can be seen to have brought forth an increase of claims which impinge upon the rights of others and, the rights of society as a whole. This situation, a situation which is seen by many outside the judicial circle to be a situation which is out of control, has re-kindled the call for a "just deserts" penal policy.

An recent example of this situation involving idealism and its "change of direction" can be noted in the re-interpretation of the rules governing time spent on remand prior to conviction in the United Kingdom. This re-interpretation of the rules governing time on remand contained within the 1967 Criminal Justice Act was brought about by an inmate who successfully sued a prison governor for having spent longer in prison than the Act provided for. Kaufman (in *The Weekly Telegraph*, 1996:266(4)), says that "...the new policy resulted from 'an extraordinary interpretation' of the [Act]". Very briefly he indicates that:

*The Prison Service's controversial new guidelines were introduced to correct what Mr Howard (British Home Secretary) admitted earlier was an 'extremely regrettable' error in calculating some sentences. Based on advice from lawyers, they (the new guidelines) stipulate that when a criminal has been given consecutive jail terms, the time spent in custody pending trial should be deducted from each part of the sentence.... The 1967 Criminal Justice Act says the length of any sentence imposed on an offender "shall be treated as reduced by any period during which he was in custody". For nearly 30 years, until two High Court cases last year (1995) led to the review, this was interpreted as meaning that time spend on remand should be deducted only once in the case of consecutive terms.*

The re-interpretation provided for prisoners serving multiple consecutive sentences to have time in remand deducted from each sentence, which interpretation has, according to Kaufman, allowed for "...the emptying [of] prisons of inmates who, the courts decided, should not be given concurrent sentences because their offences were so serious that they ought to be sentenced to consecutive terms". The results of this "extraordinary interpretation" of the Act, has not only given way to the early release of some of the most dangerous offenders, but has resulted, according to Ackroyd and Womack (in *The International Express*, August 28 1966:2), in "[M]any freed prisoners...threatening to sue the Government for wrongful imprisonment". As some claims can go back six years and some 20,000 prisoners are eligible to demand an estimated 95 pounds for every extra night spent in jail, the total bill could reach 100 million pounds. This figure does not take into account the view expressed by some lawyers on human rights who suggest that prisoners might also be able to claim exemplary damages because their imprisonment had been prolonged unnecessarily.

Hitchens (in *The International Express*, August 28 1966:2) has much comment to make about those in authority who, he says, do not have a clue what to do about crime, suggesting that:

*...the (U.K.) police and courts and prisons now have little more than a public relations purpose designed to offer voters some reassurance [and] prisons have become what the Americans call a revolving door - a directionless, amoral network of short-stay warehouses for crooks who cannot afford good lawyers.*

This type of criticism again highlights the "change of direction" within the ideals of opposing poles. What does it say of the idealism of human rights as opposed to the idealism of just deserts? To answer this question one need only to return to the United Nation's mandate reproduced above, wherein it was noted that fundamental human rights to freedom and dignity for all "cuts" two ways viz., the right of people to enjoy security of person and property



without the encroachment of criminal activity and the right to an efficient criminal justice system which does not deprive citizens of their rights. The predicament in which the United Kingdom now finds itself concerning the rights of prisoners and their dues in terms of time on remand prior to conviction at one and the same time involves the rights of the offender and the rights of the general public. Admitting that the rights of the offender have been violated by a misinterpretation of Statute, then some measure of reimbursement for unnecessary time taken away is necessary. On the other hand, to release dangerous souls into the community *prematurely* can be argued to infringe the rights of the general public to "enjoy security of person and property without encroachment of criminal activity". And it can just as well be argued that the vast compensatory claims envisaged will re-route tax payers money away from "an efficient criminal justice system" if they come to fruition. Hitchens (in The International Express, August 28, 1966:2) sums up what might be called this cleft-stick situation in the title of his comment like this "British society is lost in moral maze". What this "moral maze" means to the ordinary members of the U.K. public is summed up in the same article by a Mrs Clowes in words which have a Shutzian (see section 4.3 to follow) common-sense ring about them. Mrs Clowes says, "I don't see why any of them should get compensation. After all, they were totally in the wrong in the first place or they wouldn't have been there"!

The human rights movement is having considerable effect upon the concept of idealism in theory and upon specific criminal jurisdictions. Admitting this effect, it is pertinent to now briefly look at this impact within a particular Code of Criminal Procedure, namely, The Dutch Code of Criminal Procedure in terms of police apprehension and remand detention in the Netherlands in the light of Section 5, European Convention on Human Rights and Fundamental Freedoms (ECHR). The Dutch Code of Criminal Procedure has been chosen for this purpose because it is an inquisitorial system (unlike the accusatorial systems of the United Kingdom, the United States of America and indeed South Africa and other common-law countries), and can provide an alternative sentencing regime to the others looked at in this work. Remembering Alston's (1992:1) earlier notion of bench-marks against which standards of behaviour can be measured (section 2.5 above), it is to the Dutch penal system that this chapter now turns.

### **2.3.0 THE DUTCH CODE OF CRIMINAL PROCEDURE: police apprehension and remand detention in The Netherlands**

The Dutch penal system is not a jury system. The judge, sometimes assisted by a panel, has wide discretionary power concerning sentencing - he may sentence on his own discretion. There are very few statutory rules to guide a judge in this sentencing process, and Tak (1993:1) says that those that do exist are of a general nature which do not provide the judge with specific instructions for specific cases. Tak says in this respect that:

*An essential advantage of the almost absent rules for sentencing is that the judge can fully individualise the sentence and give full consideration to the characteristics of the crime as well as the given situation and individual characteristics of the offender.*

Tak (1993:2) indicates the advantages and disadvantages of a lack of sentencing rules in this way. He says that the benefits accruing from the absence of mandatory rules for sentencing is:

*...one of the reasons for the mild penal climate [in the Netherlands]... reflected in a rather low prison rate (47 per 100,000 in population in November 1992).*

He notes the disadvantages as relating to a greater disparity in sentencing. This problem he particularly identifies as being in conflict with the fundamental right that all persons shall be equal before the courts, and there is also the uncertainty faced by the offender and his/her defence lawyer who cannot predict the sentence. Because the system is comparatively uncomplicated it leads to what Tak (1993:16) calls mild and harsh courts and he says that "Recent research shows that the sentencing in more or less comparable cases seems to be determined too much by the culture within a court, or even by the person of the judge", rather than the facts of the case.

Tak (1993:2-3) indicates that the workings of the sentencing Code in the Netherlands provide for only a third of all yearly criminal cases being tried by the criminal courts. He says the remainder are not heard by a criminal judge but are dealt with in the preceding phase by the Prosecution Service, covered either by a conditional waiver or by a composition - the so called transaction whereby the accused voluntarily pays a sum of money to the Treasury to avoid a criminal prosecution and a public trial. He says:

*The public prosecutor is entitled to close a criminal case officially on the basis of a composition for crimes which carry a statutory maximum prison sentence of six years. [However] Directives have been issued regarding the common crimes for which the transaction is most frequently used. The main aim of these directives is to minimise the rise of arbitrariness and lack of uniformity in the application of the transaction. In principle, prosecutors are formally bound by these directives .*

The Dutch method of composition is dealt with more fully in Chapter 7 to follow, whilst here, note is made of the primary differences between the criminal justice systems of The Netherlands, the United Kingdom and the United States of America. Firstly, unlike the

Netherlands, both the U.K and the U.S.A (in certain States) operate a jury system which limits a judge's discretionary powers in that laypersons have an input into making sentencing decisions. Secondly, in the U.K and the U.S.A., most criminal cases do reach the criminal courts - there is no provision for conditional waiver or composition. Thirdly there are rules and sentencing instructions in operation in the U.K (if somewhat limited) and in the U.S.A (in just over half of the States), to guide sentencing sanctions in order to limit disparity.

However, according to Tak (1994:1):

*The Dutch Code of Criminal Procedure has been reformed considerably over the last few years. In the past the code was regularly supplemented and changed, but the current revisions are of such a nature that the question has already been asked whether it is not time for a total law reform, as has recently taken place in countries like Italy, Norway and Portugal [to a more accusatorial system].*

In answer to this question Tak (1994:1) refers to the Dutch minister of Justice's memorandum to Parliament of 18 April 1994 in which he [the minister] extensively deals with the present state of the Code of Criminal Procedure law reform, saying it is the minister's opinion that the Code does not require a full law reform. However, Tak says that a "'No' to integral law reform does not mean that the Code is not involved in a permanent process of reform". He indicates three important reasons for major change: the age of the Code, technological progress and the impact of international human rights instruments

*Examining Police Apprehension and Remand Detention in the Netherlands in the Light of Section 5 of the European Convention on Human Rights (ECHR)*, Tak (1994:1-2) identifies three important reasons for why the Dutch Code had to change. Firstly, the original Code dating from 1886, updated by the present Code in 1926, is old legislation. In terms of victims of crime, the Code did not cover areas like civil compensation, and private prosecution was an impossibility. There were also problems with regard to witnesses, which involved a total lack of witness protection regulations. Secondly, he identifies the need to cover for the use of advanced technical means of coercion, for example the taking of blood without the suspect's approval. And, thirdly, what he calls the impact of the international human rights instrument and the need to meet the demands *stemming from it*. It is the third reason for change which is of interest here.

Regarding the ECHR guidelines on pre-trial detention and the resultant deprivation of liberty, the author elaborates upon several areas of ECHR concern, for example police apprehension, police custody, the right to challenge detention and the right to compensation

for unlawful detention; relating these areas of concern to the international human rights-instruments applicable to police apprehension and pre-trial detention. It is of import to note the strength of international legislature which can impose restrictions upon specific national policies of criminal procedure. In this respect Tak (1994:15) says that:

*Violations of the right of the liberty of citizens which the state may commit within the framework of a proper administration of criminal justice, are so far-reaching that they should take place with the utmost diligence within strictly defined statutory criteria with an extensive possibility of judicial examination.*

And he further indicates that "...it also seems desirable within the framework of human rights to pay attention to the way of implementation and to examine to what extent the dignity of a human person is at issue". Various areas are highlighted in which the international human rights organs exert their will upon the Dutch Code, for example, that statutory regulations in force within the Netherlands "...shall not be applied if such application is in conflict with binding provisions of treaties or of resolutions of international institutions". And he concludes that, "At numerous moments during the implementation of pre-trial detention the observation of human rights as laid down in section 5 ECHR requires extra attention" (Tak 1994: variously). Clearly, the pressures brought to bear upon various national legal policies by the human rights organ are both pervasive and unavoidable .

### **2.3.1 The effects of the human rights movement on sentencing policy**

Using The Dutch criminal justice system as a guide, it can be argued that the international human rights movement has moved theory far from Beccaria's simplistic model of crime and punishment, towards a system which is having to continually re-define its **purpose**. Juridical policy is now no longer wholly defined in terms of theoretical models. However, some model is a necessary requirement to any sentencing policy - it just needs what Radzinowicz (1966:103) referred to as "careful balancing of the advantages of a measure to society and to the individual".

To pick up the threads of the original theme of this chapter on theoretical schools of thought, a closer look at the previously identified purposes for punishment, viz., retribution, deterrence, rehabilitation and prevention is undertaken.

## **2.4 THE PURPOSES OF PUNISHMENT**

Four broad concepts re-occur within all theory and literature pertaining to sentencing: viz., **retribution, deterrence, rehabilitation and prevention**. It has been argued elsewhere that theoretical schools of thought need to be seen as starting points for ongoing re-evaluation of particular needs over time and within punishment/sentencing policies. For example,

Classicism was shown to be guided by a retributive philosophy which as the theory developed in practice, was required to embrace the elements of deterrence, prevention and rehabilitation, in order to address particular societal needs. Thus, Radzinowicz (1966:123) indicates that "Each generation has to face the task afresh and none can claim its solution as final".

### 2.4.1 Retribution

In 1991 Lord Longford (1991:175) said that:

*...thirty years ago the concept of retribution was regarded as reactionary, even out of date....It is now back with a vengeance, though vengeance is not a happy word in this connection....*

The dictionary definition cites to repay, or to recompense for a crime committed. All punishment in terms of sentence in some way takes up this issue of repayment, either based on the results of the deed or the culpability of the offender. However, this either/or situation poses further problems in definition for various authors, for example Van Der Merwe (1991:3-22) who in saying, that "a balance has to be struck between these two aspects as far as sentencing is concerned", considers what Yakoviev (in Van Der Merwe 1991:22) terms, the subjective aspects of a crime - the guilt and personal characteristics of an offender - and the objective aspects of a crime - the damage caused and the consequence/severity of a criminal act. Quoting Hart (in Van Der Merwe 1991:22), he indicates a retributive distinction between the justification and quantification of sentencing, what Hart terms "shadow-fighting between Utilitarians and the opponents", and notes Hart's assertion that balance and repayment are consistent with the general justifying aim of the practice of punishment and its beneficial consequences. Aims are qualified or restricted in relation to deference to principles of distribution which require that punishment should be only of an offender for an offence.

Packer (in Duffee 1980:27) offers yet another way of defining retribution, he says that retribution is either revenge, as he puts it "meaning that the offender is paid back or that society fulfils the promise (threat) made in the criminal law. Or, expiation, meaning that the offender pays back in return for something he has taken". Packer argues that whatever definition is used, the term in essence means that "the criminal is to be punished simply because he has committed a crime".

Further, Van den Haag (in Duffee 1980:39) provides an interesting thought on the notion of retribution which takes up Packer's ideas of revenge. He suggests that "...retribution, or maintenance of [an] objective order, will control subjective urges", saying that if retribution were dropped from the theoretical premise, revenge would increase in frequency. Walker's

(1991:7) discussion of the retributive tradition makes note of the rationalist Greek philosophy of vengeance and the early Christian doctrine that sins can only be expiated by suffering or penance, and Cross & Ashworth (1981:128,9) speak of vindication as the basis of retribution in the sense of society's claim to amend for the harm done. These authors argue that some features of sentencing can only be explained on the basis that the sentence, or part of it, is allocated to the purpose of vindictive satisfaction.

The various ideas on retribution within sentencing policy can be brought into focus if one thinks of retribution as fulfilling a promise, both to the offender and the victim. In this respect the law, which Van Der Merwe (1991:3-2) says is a "body of enacted or customary rules recognised by a community as binding", is both binding on all and, exists for the protection of all. Protection is more usually seen to apply to the victim of a criminal act, but as a member of society, the offender is every bit as entitled to be protected from the risk of castigation. The "promise" made by the legislature towards the offender is that he will be punished in proportion to the harm done, whilst the same "promise" in relation to the bulk of society (and more so to the victims of crime), is that the law undertakes to protect the public. In this respect the law must be seen to be fairly applied in an objective fashion which adheres to the statute provided, certainly not as a response to emotive principles, which can so easily be led by what Lord Longford (1991:183) terms "the baying of the mob". Applied objectively, the law can be said to have a deterrent effect as will be seen in the next section.

#### **2.4.2 Deterrence**

Within all the literature on retribution the concept of deterrence appears. It is almost impossible to define this concept without giving due consideration to the possible consequences of the retributive act. Lord Longford (1991:188) makes the connection abundantly clear in this way, "...retribution is bound up with deterrence... because neither...can perform their task adequately unless the penalty is felt to be just". Likewise, Duffee (1980:25) tells his reader that "While deterrence and retribution are usually summarily distinguished in elementary texts...there is evidence...that these terms are ambiguous...".

Cross and Ashworth (1981:135) suggest that in its pure form, deterrence theories of punishment are related to an experience, threat or example of punishment which discourages crime. Walker (1991:14) discusses the concept in more detail, noting that to deter can fall into different levels of definition claiming that a deterrent need not just be a penalty. In this respect he says that high walls and dogs can deter - he calls these "on-the-spot deterrence" - but notes, however, that sensible penologists do not doubt that penalties operate as primary deterrents saying rather that "[W]hat some question is whether the nature or severity of penalties makes much difference to their efficacy" (1991:15).

The public also appear to believe that stiff penalties have deterrent value and this is brought home to the observer through research. For example, accepting that deterrence is informed by retribution and/or punitiveness on the part of the public, Kuhn (1991, in del Frate et. al. 1993:271) tested respondent views against the case of a young 21 year old man who having stolen a colour television, is found guilty of a burglary for the second time. Interviewees were asked to determine the sentence which would be the most appropriate. Options offered ranged from a fine to a life sentence, through community service, suspended sentence and imprisonment of variable length. Prison sentence over 6 months was considered to show a very punitive attitude whilst a prison sentence under 6 months was considered to be a medium punitive attitude. Of the fourteen countries tested, the U.S.A response was the most punitive with 55 percent of Americans imposing a prison sentence three quarters of whom chose a sentence of more than 6 months. Interestingly, South Africa recorded a very high punitive score to this offence at 65.5 percent (*in* Naude et.al., 1993:552). Likewise, Walker, Hough and Bottoms (1988:6) in a work entitled *Public Attitudes to Sentencing* note that, although interpreters of surveys infer that surveyed respondents are not punitive, "...when the 'majority' who did not choose the retributive aim are examined, substantial percentages are found to have endorsed other aims which justify severity rather than leniency in sentencing". If, as stated above, deterrence can be aligned with retribution and punitiveness, the public appear to believe that harsh sentences do make a difference to "efficacy".

On the other hand, Mortimer (1995:43), whilst admitting that there is a continuous call for longer and longer sentences, argues that punitiveness is not the answer to deterrence. He says "What matters and what deters people most is the detection rate, and unfortunately that is only seven per cent of crimes..." .

Deterrence can also be linked to the concept of rehabilitation and thence to crime prevention. For example, as noted in the next section, if one can provide a policy which successfully rehabilitates an offender, then one has effectively taken a measure which may help to prevent crime.

#### **2.4.3 Rehabilitation and crime prevention**

Policies of sentence which seek to rehabilitate an offender aim at the same time to prevent crime. For an offender to be rehabilitated he/she has to have come into contact with the legal system. Regardless of whether or not penalties are informed by retributive or deterrent underpinning, they at one and the same time seek to reform the person, leading hopefully in the final analysis to the prevention of further crimes.

Cross and Ashworth (1981:140) say that there are two aspects to the reformatory theory of punishment, "...the idea that reform can come through the punishment itself and the idea of

reform as a concomitant of punishment". The first aspect, they say, is now unfashionable - that the pain of punishment has reformatory merits - a very Classical/Utilitarian merit. The researcher would dispute this judgement, and would argue that with the passing of 14 years since Cross and Ashworth's work, this merit is very much to the fore again, at least within the public perception of what they think they want from a judicial policy. The second aspect - a concomitant of punishment itself - is, they say, fashionable, for example probation, where the reformatory element is so well accepted that it is seen in law as not a punishment at all - again, a reversal of what appears to be the public's view at present.

However it is well documented within juridical literature, and one cannot help but agree with research in this area, that the success rate of imprisonment as a reformatory measure is extremely discouraging - prison sentence tends to make the offender more criminal rather than less. In this respect Cross & Ashworth (1981:141) say that:

*...imprisonment is destructive...of family [life]...encourag[es] the prisoner's identification with the attitudes of the prison community, increases his alienation from normal society...[and,] long-term institutionalisation is all too likely to destroy a prisoner's capacity for individual responsibility....*

As a failed reformatory measure, a look at the problem of recidivism shows that many offenders have previous prison records. For example, looking at the most serious category of offender, Naude's (1993:320) research into prisoners under sentence of death in South Africa indicates that of the 320 prisoners confined under sentence of death at the time of the research, 228 (71,3%) had previous convictions with 28,5 percent having had more than five previous convictions and 66,2 percent having two or more previous convictions. Furthermore, Naude (1993:320) notes that "According to Greenfeld, 69 percent of United States death row prisoners had a previous criminal conviction record". The recidivism situation may be due to two influences. Firstly, if one mixes with *bad* individuals, one may expect for one reason or another, to be bad oneself, a proposition upheld by the delinquent subculture theory, and Cross & Ashworth (1981) above. Secondly, certain literature indicates that offenders are often subjected to the effects of brutality and dehumanisation inflicted by correction department employees during their internment. For example Tonry & Zimring (1983:102) note that:

*It is common practice for an inmate to be singled out by some Corrections Department employee because he did not hear the officer call his name or because the officer did not like the way this or that inmate looked or because of the manner in which the inmate walked....*



Thereby it can be argued that reformative criteria in terms of imprisonment, is prone to problems on several counts. Which is one of the reasons why Radzinowicz (1966:114-5) is able to suggest that during the past 100 years no unifying theory on sentence has evolved. He says,

*...there have been the classical school, the positivist school and many shades of variation in between. There have been all the political changes, the criminological researches, the penological experiments of the present century. But still the question remains: is not the search for a single purpose in punishment like the search for a single cause of crime?*

Once again this debate can be linked in various way to theory. For example the sociological concepts of nature/nurture flow into the debate within criminological circles concerning determinism and indeterminism. Briefly, nature refers to one's innate genetic make-up, the characteristics of which are pre-programmed at birth through genetic heredity. Nurture refers to the socialising aspects which affect each individual within society. As far as can be ascertained all people are a mixture of both nature and nurture. Socialisation occurs within a particular time span and within a specific culture and, furthermore, within the multidimensional arena of such concepts of class, intellectual ability and so forth. Therefore, it can be argued that socialisation is to some extent dependent upon the nature aspects of the individual make-up.

It can be suggested that this multidimensional arena involves what one might call a mosaic of attributes which, as they mould together, form in the human being a unique entity. This is not to say that humans do not "overlap", they do in many ways. Schutzian theory would consider this *overlap* as our "common-sense" knowledge of the world around us. Schutz (1973: variously) speaks of the social world as a world which is experienced by people as common and shared. He says that the world has the appearance of being a given entity which is "out there" organised and independent, but counteracts this assumption by arguing that the knowledge of such a world has to be assimilated, interpreted and made sense of. This making sense of the world can only be done by humans through a common-sense knowledge which allows people to make practical assumptions about everyday activities which they assimilate into consciousness. Rogers (1983:13) indicates that Schutz says of this meaning-making that:

*The human world is assimilated into consciousness by what Schutz refers to as typifications which basically denote a common-sense knowledge of the world.*

Bringing this Schutzhian (1973) argument into the realms of criminological debate through the concepts of determinism and indeterminism, and looking at the concept of reform, picks up on the Radzinowich (1961:115) quotation above which says "but still the question remains, is not the search for a single purpose in punishment like the search for a single cause of crime"? According to Schutz (1973), it has to be. If humans are indeed unique, one answer to anything is just not possible. Taking this debate to its fullest extent, one may ask if it is possible that some people are "predetermined" with a criminal gene? In answer to this, one need only remember the discredit afforded Lombroso, who in suggesting this very hypothesis, produced research which was biased. Perhaps one might consider innateness versus socialisation in terms of the very beginning of social life itself? Might one be able to say that the "initiated" births undertaken today (the intervention of induction birth and drugs) have a bearing upon the "mosaic" discussed earlier? Can drugs given to the mother at birth alter genes? According to Naude (1986:118) biochemical disorders do have a bearing on criminal behaviour during life, as likewise do the drugs used by the medical profession to correct such disorders. This debate sits nicely at the epicentre of the nature/nurture argument in a school of thought within sociological and criminological circles known as biological determinism. However, to widen the debate in this way does not so much provide answers to crime and punishment as it does to provide yet more questions which cannot be addressed here.

Various forms of punishment other than imprisonment are widely in use today, for example: the fine, probation, parole, correctional supervision, indeterminate sentence, and there are also the practices involved with decriminalisation, depenalisation and diversion which act upon sentencing practice (see chapter 4). Many of these sentences can be said to dilute the Classical theories discussed earlier in this chapter because they tend to lessen (not negate), the belief in individual responsibility for acts and their basis of individual free will and choice. Here one finds oneself in an arena which does not fully blame the offender. An arena which does not seek to place sole responsibility upon the individual - at least in part, because there is a CO-responsibility to do something about it using punishment models which aim to give a second chance - to rehabilitate and prevent. It can be argued that many of these other punishments accept a modicum of societal responsibility for why the offender offended - one's free will and choice are moulded/affected both by society's members and by its various constraints (something akin to a Marxist perspective on crime).

#### **2.4.3.1 Biological determinism: the sociological debate**

This area of responsibility is an interesting one which again impinges upon the nature/nurture debate. Whilst not wishing to reiterate what has already been said concerning the question of whether or not individuals are a product of genetics or a product of society, it is pertinent to briefly touch upon the aspect of what Van Der Merwe (1991:1-3) terms "cultural determinism". Van Der Merwe uses Vold to highlight the inconsistencies between the biological view of

people and the rational view which does not take up the cultural (nurture) aspects of society. As a biological entity, people think, (reminiscent of the Cartesian concept of *Cogito, ergo sum*, "I think, therefore I am") , in other words they rationalise, and that rationalising process is affected by culture: human beings are, therefore, always related to and somehow a reflection of the characteristics of the social-cultural world in which they happens to function.

To the researcher's mind there is only one answer to this dilemma, the recognition of an "inter-subjective lifeworld". Inter-subjectivity can, for the purpose of this work, be defined as the process whereby there is a sharing between the biological person and the biologies of others. This sharing means that individual self-consciousness is formed by innate attributes (like genes and cognition) and yet, at the same time is influenced by the verbal interactions of others - both of which are formed within a cultural setting. Schutz (1973:10) puts the argument in this way:

*...[the world is inter-subjective because] ...we live in it as men among other men bound to them through common influence and work, understanding others and being understood by them. [Understanding operates through]..the historicity of culture...our own and our fellow men's, contemporaries and predecessors...*

People do not live in a private world. Institutions - the legal forum is one - are formed by people (what Berger & Luckmann 1976:1, term "man-made") through interaction with other human beings, and this takes place via a dynamic process of negotiation involving a continuous and ongoing interpretation and mediation by all parties. Society is not a static structure, but a flowing symbolic reality wherein people take account of things around them on the basis of the meanings they have for them. Through dialogue, meanings are negotiated and modified as people interact and try to make sense of *reality* (Pitfield 1992:36).

It may be argued that penalties have to change as crimes and society change and people attempt to make sense of the reality through negotiated models of theory. Furthermore, Radzinowicz's earlier indication (see section 2.1.1), that each generation has to face the task afresh and none can claim its solutions as final, can also offer an explanation why most authors on the subject of theory and punishment note both measures of success and failure attributable to various penalty alternatives.

Not only has the theory and types of penalty shifted emphasis in relation to biological/cultural determinism, but so too has research - from what we might call the theoretical attempt to assess the specific function of punishment, to the practice of the function of punishment. This Radzinowicz calls what is intended and what is achieved. This notion of intention and

achievement returns us to where we began this particular section, with Van Der Merwe's justification for and purpose of punishment, and in a strange way, to the earlier discussion on human rights. For example the removal of a dangerous offender from society as protection for the remaining members of society, as it achieves its aim through incarceration, removes certain rights from the incarcerated and, if one is to believe the literature, possibly makes them more criminal. Movements to restore the rights of incarcerated offenders now exist throughout the world. Summarising the debate within this chapter so far, one has to say that modern sentencing policy yet again seeks a balance between what can most directly be termed the rights of the individual and the rights of society. The problem is and always has been, where to place the dividing line.

In what remains of this chapter on theoretical underpinnings to sentencing policy, a brief examination of the criminal justice systems of the U.K. and the U.S.A., is undertaken in an endeavour to show how like theories have, in part, provided for two divergent criminal justice systems.

## **2.5 THE CRIMINAL JUSTICE SYSTEM AND SENTENCING POLICIES OF THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA**

### **2.5.1 Theories of punishment**

According to Cross and Ashworth (1981:121) theories of punishment are invariably divided into three questions, viz., why punish? Who should be punished? And, how much punishment should be inflicted? The authors note that "Any account of the theoretical basis of a sentencing system must necessarily be primarily concentrated on the third of these questions...". Various it has been noted within this chapter that theories of punishment ebb and flow between two main beliefs, that the offender can either be rehabilitated or prevented from transgressing again through punishment, or simply, that the offender is made to pay for his folly. But, it has also been shown that a purely utilitarian or just desert motivation is far too simplistic. Any such concretised stance suffers from an inability to address certain other issues in the debate on punishment - for example, the accountability of the offender towards the victim. And of course it ignores the human rights lobby which was noted earlier in this chapter as having had a considerable impact upon judicial reasoning. What effect have these competing ideologies had upon the sentencing policies of the United Kingdom and the United States of America?

#### **2.5.1.1 Brief Synopsis - UK & USA Sentencing**

The United Kingdom (UK) and the United States of America (USA), like all other sentencing domains, have had to deal with the oscillations inflicted by changing theoretical stances. But, in doing so, their criminal justice systems have adapted along two different paths. Whilst the UK has attempted to update old legislation in what Thomas (1993:13) calls a piecemeal

fashion (a fashion which is noted hereunder as unsatisfactory for various reasons), the USA has attempted (and is continuing to attempt) to provide Sentencing Guidelines through the formation of sentencing guideline Commissions. In this next section, the development of the British system of sentencing is researched in order to try to identify the influences of theoretical thought within its structure.

## **2.5.2 The Criminal Justice system in the United Kingdom**

According to Faulkner (1993:1)

*It has always been difficult in this country [UK] to establish any clearly defined or generally accepted principles of sentencing, or any generally understood purposes which sentences are supposed to achieve. There is no generally recognised responsibility for establishing them or for reconciling different points of view, still less for developing a "sentencing policy". ...This is especially so at a time when, rightly or wrongly, rehabilitation and deterrence are by many people dismissed as unrealistic aims of sentencing, at any rate so far as they can be achieved in our existing society or through the existing criminal justice system.*

It is pertinent to begin this look at the United Kingdom criminal justice system with Faulkner's words, because in these very few lines he manages to contextualise the vast lack of any integrated thought on theories of punishment and sentence, not only for the purposes of this discussion within the U.K., but it might also be said, globally. Such a lack is apparent within sentencing policy literature on the subject world-wide.

With these thoughts in mind, and Thomas's indication that legislation in that country has tended to be piecemeal, England's historical path to juridical policy began with what Van Der Merwe (1993:2-26,27) terms a strong influence from Romanistic doctrine, which influence "...was reflected in practice". Judges of the period quoted whole passages from the Institutes or Digest in their judgements. Van der Merwe indicates that what prevented early English law from a total reliance upon Roman law (as took place in other parts of the world) was "...the legal profession and the inns of court" in the U.K. He says, "This point is worth noting, since the bar also forms the only source of judges in Great Britain" and led to a sharedness between common-law heritage and Roman law doctrine. Van Der Merwe further notes that "...[this] also perhaps explains why England has never codified its legal system..." and he suggests that this sharedness "...actually made English law stronger...[and] more independent from later developments of Roman law on the continent". He uses the following quote to summarise this union:

*We [U.K.] have received Roman law; but we have received it in small homeopathic doses, at different periods, and as and when required. It has acted as a tonic to our legal system and not as a drug or poison .*

According to Van Der Merwe (1993:2-26,27), English law - in lacking a codified system of judgement - fails to fully formulate *mens rea*, or criminal intent/liability. Presumably, this failure is in part due to the juridical mixture of common/Roman law. This is why Lord Denning, (in Hall 1987:134), is able to say that:

*The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners are faced with new situations where the decisions may go either way. No one can tell what the law is until the courts decide it. The judges do everyday make law though it is almost heresy to say so.*

This way of thinking allows Thomas (1980:3) to note that "The shaping of sentencing policy is entrusted substantially to the judiciary...".

However, although English law presents as a semi-fluid structure which is interpreted and re-interpreted in terms of the cases which come before its courts and judges, the judiciary are not totally unconstrained.

#### **2.5.2.1 The Criminal Division of the Court of Appeal**

The Criminal Division of the Court of Appeal occupies the epicentre of the juridical body in the United Kingdom and is the overall authoritative body which determines policy principles. This body has appellate jurisdiction over all sentences passed in the Crown Courts of England.

Over a period of some seventy years, The Criminal Division of the Court of Appeal has become what Thomas (1980:4) notes as a, "Division [which] lays down principles and guidelines to assist sentencers of all grades in the application of the discretion which the imposition of sentence requires". This really is the crux of the United Kingdom legislative policy: guidelines to assist discretion. In other words, judges within the English Crown Courts do have the authority to either accept this assistance or not. However, Thomas (1980:4) further notes that:

*...while its decisions on the proper exercise of sentencing discretion do not create law, they are intended to be binding on, and followed by [sentencers].*

The British system is a two-way affair. Crown Court decisions which come before The Criminal Division of the Court of Appeal, are adjudged by that Court in terms of its previous decisions on punishment principles in terms of its authoritative precedents. The Court also continuously revises its own decisions in the light of new cases which come before it for judgement.

However, the Court is limited in its scope by the procedures of criminal appeal - only an offender is permitted to initiate an appeal against sentence. Thomas (1980:5) says that Britain does not allow the prosecution to appeal against a sentence on the grounds that this action would not serve the public interests. What is of interest to us here is the fact that, even when the Court appears to hand down a series of principles in a systematic manner, which one might say could be likened to the system in the United States of America, differences between the two systems are still quite apparent. For example the **tariff** (the principles governing the lengths of sentences of imprisonment), which on the surface look to the observer as just another way of having pre-defined a just imprisonment term for a specific crime, finds Thomas (1980:5) noting that:

*...to identify the operative principles from the examination of a considerable number of cases, none of which specifically identifies the relevant criteria, but which, when viewed collectively, clearly conform substantially to a pattern which can be described.*

In other words, unlike the U.S. sentencing guidelines which decide sentence on a numerically tabulated matrix grid using the crime and the offender as co-ordinates, Britain retains its ongoing definitive powers which balance both Common and Roman law, Crown Court decisions and, thereafter, the precedents set by The Criminal Division of the Court of Appeal.

### **2.5.3 The U.S.A. Criminal Justice System: sentencing guidelines**

It has to be said that the United States of America Criminal Justice policy stems from the same theoretical movements as those experienced in the United Kingdom. The tides which ebb and flow between differing ideologies and purposes of punishment are as visible within the U.S.A criminal sentencing structures as they are within that of the U.K. And, it can further be said that the justice system in that country has responded in like manner to like demands for variously, rehabilitation, just deserts, punitiveness, prevention and individual human rights. However, whilst developing from the same theoretical judicial background, the U.S.A has, in several States, evolved ways of addressal which differ from those in the UK. It was noted that within the U.K, sentencing decisions primarily remain in the autonomous hands of judges (aided by precedents set by The Criminal Division of the Court of Appeal). However, for various reasons (for example the endeavour to limit/reduce the use of imprisonment and

ensure consistency), the U.S.A elected to set up a Sentencing Commission whose sole purpose was to provide sentencers with definitive sentencing guidelines.

In 1987 the Sentencing Commission produced its first set of comprehensive sentencing guidelines. Although they were not well received, and do not function without problems, they provide a mandatory sentencing tool which is oppositional to the policy utilised within the U.K. - a system which has arisen from the same theoretical pushes. Using a numerical matrix tabulation relative to offence (crime committed) and offender details (age, past criminal record etcetera), judges sentence from the guideline grid in accordance with pre-defined punishment ranges. Annexure "D" provides a brief historical backdrop on the rationale behind the U.S.A sentencing guidelines, together with a summarised explanation of how the grids work.

#### **2.5.4 Theoretical linkages**

Within the sentencing platforms of both the U.K. and the U.S.A it is possible to identify various theoretical underpinnings which can be linked to theoretical application. For example, in the U.K. the principles behind the tariff sentence are different from those which govern the selection of individualised measures. A tariff sentence smacks of a punitive purpose whilst a probation order for example, is aimed at an individualised disposal. Thomas (1980:7,8) argues that this distinction, between what he calls "...two distinct systems of sentencing, reflecting different penal objectives and governed by different principles" began in the UK in 1907. He says:

*Legislation was enacted to confer on the courts the power to deal with the offender as an individual, as opposed to following the punitive approach implicit in the nineteenth-century legislation.*

It will be remembered that, broadly speaking, it can be said that punitive measures embody the ideals of the Classical school of thought, because the aim is to punish in direct response to the crime committed. In turn this form of punishment can be related to the just-deserts philosophy and to the principles of punishment "for the good of all" within society (see earlier discussion, sections 2. to 2.3.above).

From this period onwards, there was in the U.K., a gradual departure from punitive measures of punishment towards the more individualised means which, as a generalisation, sought to rehabilitate or prevent rather than merely punish for punishment sake. This form of idealism can broadly be equated with the Utilitarian school. In 1908 The Prevention of Crime Act introduced two new custodial measures. Borstal detention for young adults and preventive detention for habitual offenders. In 1948 The Criminal Justice Act introduced a custodial



sentence of corrective training, unrestricted power to fine, a combination of probation with psychiatric treatment and a new system of short-term detention. Further, in the 1960s a dramatic increase in the number of non-custodial methods of disposal is noted (for example the suspended sentence), and in 1972 the emergence of community service sentences. The decline in punitive measures of disposal in the UK and the subsequent rise in more individualised means of punishment, can be almost directly related to the United Nations lobby for individual human rights. In this respect one notes Alston (1992:2) saying that:

*The years since 1946, and particularly since 1966, have seen a dramatic increase in the number of UN organs devoted primarily to dealing with human rights matters...the evolution of the regime has reflected specific political developments....*

It can be argued that these political developments have affected sentencing policy in that juridical actors must be seen to be protective of the individual rights of each individual, both victim and offender. In this arena it is not just society as a conglomeration which is important, but the rights of each and every citizen, even when that individual steps outside of the bounds of what is considered acceptable behaviour and offenses.

In the U.S.A the same theoretical anomalies are apparent. For example von Hirsch (1989:370,1) argues that the U.S. sentencing guidelines were a means to rid sentencing practice in that country of its overzealous individualising elements. He says:

*Traditional discretionary sentencing concealed the need for a rationale. In the name of individualising the sentence, the judge was free to choose his own set of preferred aims. The resulting normlessness contributed to sentencing disparity....Sentencing guidelines consist of a system of rules indicating which sanctions are preferred under which circumstances...without the guidance of a coherent rationale, the choice of a particular set of rules, imprisonment for this kind of case, probation for that kind - is arbitrary.*

Lowe (1987:4,5) argues that this attempt in the U.S.A. to introduce more determinacy into the sentencing process is defeated by the general lack of consensus on sentencing theory and purpose, since what he terms the demise of the rehabilitative ideal. Lowe suggests that Congress further confused the issue with its directive that sentencing decisions should be guided by notions of just deserts as well as utilitarian theories of punishment, saying that in terms of the realities of sentencing, the theories are not complementary. In this respect, section 2.4 above, notes that just desert philosophy advocates that the criminal act be punished per se, taking up the stance that individual free will encompassed autonomy,

rationality and responsibility for choice, whilst Utilitarian theory - as a deterministic philosophy - maintains that choice is mediated through the individual biological character, and as such, individual autonomy, rationality and responsibility of choice are impeded.

Notwithstanding the above, what one actually perceives here within the U.S. sentencing forum, is the same ebbing and flowing of philosophical ideologies which have informed U.K. juridical policy over the years, a move from too stringent and punitive punishment to discretionary punishment options (individualised and guided by a rationale to rehabilitate and prevent). These types of punishment options, e.g. probation, community service etcetera, have, as noted previously in this work, invariably been perceived by the public as soft options and their perception is the forerunner of a public voice which calls for more punitive measures to correct high crime figures. In the United States this *path* led to the setting up of the Sentencing Commission and their sentencing guidelines, providing for what amounts to a call for more determinacy and less indeterminacy in sentencing: a more "concretised" system.

There are thus two juridical systems which have arisen from the same pushes and pulls of theoretical, political and lay perception, and yet have developed in two entirely different ways to provide criminal justice systems which address the same problem from opposite poles. Both criminal justice systems are now at the same watershed, both are standing at a dividing line between on the one side the public's call for harsher measures to address crime, and on the other, the need to find punishment regimes which protect the human rights of each and every individual (the offender, the victim and all members of society). Lord Longford's (1991:175) supposition that "retribution is back with a vengeance" now has to be mediated by, and directly related to, the promotion of respect for individual human rights.

## 2.6 CONCLUSION

This chapter began by looking at various theoretical schools of thought which have had considerable influence upon the policies of punishment and sentencing world-wide. The chapter moved on to discuss contemporary issues and in doing so considered the human rights movement and its impingement upon the Dutch Legal Code. A short discussion of the effects of theory on sentencing policy, and the purposes behind them followed, clarified by consideration of the four guiding concepts of punishment, viz., retribution, deterrence, rehabilitation and prevention. The foregoing debate was then extrapolated in order to examine the criminal justice systems of the United Kingdom and the United States of America. Finally, the links between theories of punishment and sentence were highlighted in relation of the sentencing policies of the U.K. and the U.S.A. In the next chapter various ideas from this discussion are again taken up to look at the development of the Criminal Justice System in South Africa.

## **CHAPTER 3**

# **PUNISHMENT IN SOUTH AFRICA**

## CHAPTER 3

### PUNISHMENT IN SOUTH AFRICA

*In the fourteenth century [it] would have [been] said [that] the devil put such thoughts [as crime] into head[s], now in a post Freudian world it has to be a complex or, to be really up to date, a chemical imbalance. In a hundred years [they will] come up with some completely different explanation...the truths of one age [are] the absurdities of another... (in Sharp 1981:76).*

#### 3.1 INTRODUCTION

In the previous chapter theoretical schools of thought were discussed in relation to theories of punishment and sentence within the United Kingdom, the United States of America and The Netherlands. The suggestion was made that criminal jurisdictions have adapted their sentencing practice in line with the "oscillations inflicted by changing theoretical stances", and have developed sentencing policies along different paths. Added to this, it was suggested that the human rights movement has provided yet another influence upon theoretical philosophies.

It was shown that in the United Kingdom, judicial legislation has been "updated" in what Thomas (1993) terms "a piecemeal fashion" - in other words the reconsideration and alteration of statutes which are perceived to no longer address the crime problem in that country. In the United States of America, the introduction of a Sentencing Commission has, in some States, provided sentencers with mandatory definitive sentencing guidelines in the form of numerical matrix sentencing grids. The Dutch Code of Criminal Procedure was discussed in order to highlight the influence of the human rights movement upon sentencing policy within the Netherlands.

In this chapter, the study draws upon the ideas expressed within Chapter 2 to look at sentencing in South Africa. The chapter traces the formation of the Republic of South Africa, the evolution of its legal system and the ideological backdrop to sentencing in the country. The chapter gives consideration to theoretical influence on sentencing policy in South Africa, and furthers the debate on the human rights movement within the country, linking the ensuing discussion to the purposes of punishment.

## 3.2 THE UNION OF SOUTH AFRICA

### 3.2.1 The law in South Africa

In line with the main purpose of this study, which is to present the views of *the public* of Pretoria on sentencing policy in South Africa, little space is allocated in the study as a whole to the workings of law in the country. However, it is necessary, in order to make sense of the work in totality, to provide the reader with a brief history of the formation of South Africa and its legislation. It should be noted at the outset, that the writer as a criminologist and not a criminal lawyer, is somewhat ill-equipped to write authoritatively in the field of law. What this lack of authority actually means, is best recounted by Van Der Merwe, himself once a practising criminal lawyer now turned criminal law academic at the University of South Africa.

According to Van Der Merwe (1991:1-5) "...there is unfortunately a gap between...criminology and substantive criminal law....". The author highlights what this gap between disciplines means in actuality, by quoting the Viljoen Commission report - paragraph 8.1.3. As justification of the researcher's ill-equipped legal status, this quote is reproduced hereunder in full:

*In this country [S.A.] the training at those universities where criminology or penology are taught as subjects, the faculties concerned are more closely affiliated to the faculties of sociology, social science and psychology than to the faculty of law. This is to be regretted. In most overseas countries criminology and criminal law are taught, if not as one subject, then at least as closely related subjects. While today qualifications in sociology, criminology and penology are regarded as distinct recommendations for a good position in the Prisons and Police services, very few practising criminal lawyers, magistrates or judges have qualified in either criminology or penology. Judges are as a rule appointed from the ranks of practising barristers, and whilst it is true that a barrister's experience is such that, in the course of his career, he accumulates quite a sound and useful knowledge of sentencing principles, it would be preferable if every lawyer who aspires to become a member of the Bench, could acquire a sound knowledge of criminology and penology as academic qualifications.*

The unfortunateness of this lack of union is suggested by Van Der Merwe to show that the fields of criminal law and criminology rely upon different methodologies to debate the science of sentencing. Whilst Van Der Merwe argues for a greater co-operation and participation between the two fields, and indicates that they are both dependent on each other, he notes that a differentiation in methods can be related to Olmesdahl's distinction between clinical

versus statistical methods of measurement and prediction. Using Olmesdahl's words, Van Der Merwe (1991:1-7) indicates that:

*As a lawyer, one's training is in the "clinical" approach which relies on the expert's experience, judgement and in a certain measure, intuition. [Whilst] The statistical approach... involves the mechanical application of data of specific variables in fixed mathematical equations. This is necessary not only to provide useful descriptive summaries of the data but also to attempt to provide causal explanations from the data.*

Measured in these terms, the study at hand inextricably falls within the study field of criminology and for this reason, relates to the so called statistical methods of sentencing practice. Therefore, rather than entering into a debate on the specific sanctions and procedures of South African law/sentencing, the discussion to follow revolves around an historical development of penal policy in the country.

However, before embarking upon this route of discussion, it is obligatory (in the light of recent developments contained within the South African Law Commission paper 7 of 30 June 1997 on restorative justice), to defend the thesis' reliance upon European law as opposed to indigenous law. In this respect, reliance can best be upheld by acknowledging that during the period of research, European law prevailed within South Africa. However, as if by way of confirmation of the words of Sharp (1981) which began this chapter, a new era of sentencing philosophy is dawning in the country and is about to "come up with [something] completely different". Naude (1997:57) indicates what the lack of difference has meant in this way:

*The acceptance of European law which largely repressed the customary laws resulted in victims being neglected and alienated from the criminal justice process with the result that many Africans regard the criminal justice system with suspicion resulting in few benefits for the individual. This negative perception is even more prevalent in South Africa with our apartheid history of discrimination, oppression and unjust laws.*

Restorative justice in sentencing aims to re-address customary laws, victim neglect and alienation, and in so doing argues for many of the desires of this thesis. For example it strives to empower people to take part in a meaningful way by actively become involved in the criminal justice process. It focuses upon, amongst other things, the righting of wrongs by holding offenders responsible and supports the compensating of victims for their losses through restitution. This process, is noted in the South African Law Commission report (1997:4) as "Central to the notion of restorative justice...[because it recognises]... the community rather than the criminal justice agencies as the prime site of crime control". This

way of addressing crime in society places emphasis upon the more traditional African principles which are based upon reparation rather than retribution. Naude (1997:58) says that "More emphasis on restorative justice will probably go a long way towards making the South African criminal justice system more democratic and credible to all its people while at the same time recognising the individual dignity of the victim".

The Law Commission report (*Vision 2000*) variously makes clear its preference for participatory involvement of all people in the administration of justice, and in particular sentencing. The report proposals variously call for the implementation of victim impact statements and more victim offender mediation whilst, under the heading of "The Way Forward" (1997:47), invites:

*...the comments of all parties who feel that they have an interest in this topic or may be affected by the type of measures discussed...[as being] of vital importance to the Commission.*

Such innovative ideals are to be applauded in the sincere hope that a speedy inclusion of restorative justice within South African sentencing legislation is imminent.

Chapter 3 takes up the historical formation of South Africa and its legislation.

### **3.3. THE FORMATION OF THE SOUTH AFRICAN LEGAL SYSTEM BY MEANS OF THE HISTORICAL COMMON LAW, LEGISLATION AND THE JUDICIARY**

#### **3.3.1 Overview**

Two main literature sources have been searched by the researcher for this section on the formation of South Africa and the development of its laws and constitution, viz., Hahlo & Kahn (1960) and du Plessis & Kok (1981). Although both sources are relatively old, they are widely believed to offer the reader a factual account of The Union of South Africa and its legislative evolution. Justification for an almost total reliance upon these authors for this knowledge on South Africa, lies in the researcher's belief that the facts of history are, in this particular instance, not debatable. Hahlo and Kahn (1960) provide a comprehensive background to the historical foundation of what they later term the Genesis of South African Law. It will serve no purpose to repeat this background in full, and yet, it is not possible to proceed successfully until some historical points have been noted. For this reason, a brief historical account of the arrival of law in South Africa is herein provided.

#### **3.3.2 The essentials of South African law**

In South Africa the law is divided into two types of law, viz., common law and statute. According to du Plessis & Kok (1990:24), common law in South Africa can be defined as law

which has not been enacted by Parliament or any other body with law-making powers. Common law came from Roman-Dutch law in the *Corpus Juris Civilia* together with an acknowledgement of the influential role played by judicial precedents. The authors indicate that when considering the nature of common-law, certain crimes have been crimes for centuries - for example murder - and yet no Act of Parliament enforces this crime. The process of *stare decisis* provides for certainty in the administration of justice because binding precedents ensure that "decisions must stand": such decisions are, in fact, non-negotiable.

Interpretation of the Roman-Dutch law within the *Corpus Juris Civilis* fell to the superior courts of the Cape and the various provinces, whereby over the period from "circa 1830 until the present day", vast amounts of binding precedent have been accumulated and now form the body of common law in the country.

The law of statute is the law as contained in the enactments of law-making bodies, a law which is either made through an Act of Parliament or its empowered subsidiaries. In this respect legislation (statute) can be made by subordinate law-making bodies, for example town councils who pass by-laws applicable to their municipal domains. However, subordinate laws (although sanctioned by Parliament through the autonomy given to subordinate law-making bodies) can, if considered necessary, be declared by the high court as invalid: interpretation of statute is the sole prerogative of the high court of South Africa. After which, high court interpretation becomes the binding precedent. This type of procedure allows judges like Lord Radcliff (in Hall 1987:141) to suggest that:

*...the law has to be interpreted before it can be applied and interpretation is a creative activity....*

Such activity is, according to Radcliff, not merely born of knowing facts, but is rather down to "...long and professional experience, with prepared approaches and formed attitudes of mind...which impinge upon one's [the high court judge] ability to interpret". This point of Radcliff's is taken further by Lord Denning (in Hall 1987:134) when he indicates that:

*The truth is that the law is uncertain. It does not cover all the situations that may arise. Time and again practitioners are faced with new situations where the decisions may go either way. No one can tell what the law is until the courts decide it. The judges do everyday make law, though it is almost heresy to say so.*

This is why statutory law is, according to Du Plessis and Kok (1981:27), "...legislation made by legislative bodies and interpreted by the superior courts". Interpretation is, as noted above, imbued with what we will see later in this chapter Nicholson (1992:52) calls "...the judges'



unique psyches, emotional make-up and biographies of social experience". And, furthermore, the notion of interpretation is intricately linked to the concept of judicial authority. This point will be taken up later in the chapter, but for the moment, a very brief look at the history of penal development in South Africa is undertaken.

### **3.3.2.1 Historical background**

South Africa was occupied by the Dutch East India Company in 1652 when on April 7 of that year, Jan van Riebeeck stepped ashore and formally took occupation of the Cape. Intended as a half-way house for trade between the Netherlands and the Dutch East Indies, the Dutch settlement was ostensibly to refurbish the Dutch ships with provisions during their voyages. The Cape was ruled by the Company for the next 150 years. Colonial boundaries gradually increased until the end of the eighteenth century, when, with the arrival in September 1795 of the British fleet at Table Bay, the Dutch East India Company was forced to cancel its charter by signing Articles of Capitulation of Rustenburg. This capitulation enabled England to secure a vital sea route to India and, at the same time, to exert an English influence on the economic and legislative spheres of the Dutch settlement.

British colonisation split the White population of South Africa between English and Dutch nationality. The rift which developed not only divided the two White sections of the community at the Cape, but also the White and non-White. This chain of events was to significantly affect the legal history of South Africa. With English occupation came various changes, for example in 1808 the English Act for the abolition of the slave trade was enacted and in 1828 Ordinance No.50 gave the free coloured population in the Cape full civil rights.

In 1835 the Boer Great Trek and the battle of Blood River paved the way for the first Boer republic in Natal during the year 1838. By the year 1843, legislative undertakings by the British South Africa Company, resulted in the emancipation of slaves, whilst local monopolies on internal trade were abolished and external trade restrictions were eased. Settlers began arriving from Britain, one of whom in the late eighteen-eighties was Cecil Rhodes in pursuit of what Hahlo & Kahn (1960:6) tell us was "...his dream of a British African Empire from Cape to Cairo...". Settlements formed themselves into loose federations under the name of the *Vereenigde Band van het geheel Maatschappij van deze zyde van de Vaalrivier*. These federations were afforded the right to manage their own affairs and were recognised as autonomous by the British Government in the Sand River Convention of 1852. By 1853 the title of Zuid-Afrikaansche Republiek was adopted for the new state.

During this period the British, following what one might call their inherent belief in liberalisation, invariably took the part of the uitlanders in the struggles. This *folly* led directly to the outbreak of the Anglo-Boer War in 1899; a bloody encounter which only ended with the

signing of the Peace Treaty of Vereeniging on 31 May 1902, when the Boer forces surrendered and both the Transvaal and the Orange Free State became British colonies. In October 1908 delegates of the then four existing colonies (the Cape of Good Hope, Natal, Orange River Colony and the Transvaal) met at a National Convention. Its report, in the form of a draft South Africa Act, was passed by the Imperial Parliament in London in September 1909. On May 31 1910, Lord Gladstone, first Governor-General of the new state, proclaimed the Union by the Statute of Westminster. In the year 1931 sovereign independence was finally granted.

South Africa's somewhat turbulent history, its economic wealth (gold, diamonds and other mining), and its diverse peoples, have all had an effect upon the legislation of the country. But paramount in the establishment of early law in South Africa, was the Dutch colonisation of the Cape. Dutch law was imbued with the law of Rome, which law had through Roman conquests, earlier permeated much of the Western Empire. Roman law itself was a mixture of Roman and Germanic influence - German law having been introduced into the Netherlands by the invading tribes of Germanic barbarians known as the Frisians and the Franks. This mixture of Roman and German law brought forth the Roman-Dutch law we know today. One of the major influences upon the mixture of laws, rather than an adoption of either Roman or German law, was the fact that both Roman and Barbarian were Christian.

After the fall of the Western Empire, parts of the Netherlands came under the Empire of the Franks whilst other parts remained independent. du Plessis & Kok (1990:16) indicate that during the later division of the Frankish Empire, the Netherlands eventually became part of the Holy Roman Empire. They note that, "In 1568 the 80 years war commenced and the Netherlands fought for [its] freedom against the oppressor, Philip the second of Spain". Whereafter, the independent Republic of the United Netherlands was formed in 1648.

Therefore, Roman law, with its Germanic influence, became blended with local custom and customary laws to form what today is recognised as Roman-Dutch law. du Plessis and Kok (1990:16) note what took place in this way:

*Of particular importance...are the efforts made to blend the law of the province of Holland with Roman law to form a single system. This gave rise to Roman-Dutch law (Roomsch-Hollandsch Recht) which is the foundation and main content of our [S.A.] present common law.*

What then were the fundamentals of Roman law and how did they blend with the law of the Netherlands?

### 3.3.2.2 Roman law

According to du Plessis & Kok (1960:8,9), "Originally the law of Rome appears to have been customary...with little legislation.... Roman people consisted of two main divisions, viz., the patricians and the plebeians..." and for a while it was normal for the law to function for those it considered as true Roman citizens - the patricians. Political disharmony ensued, and disputes over whom the law served were finally resolved by codification in the Law of the Twelve Tables (*Lex duodecim tabularum*) "...which is believed to [be] a primitive statement of some elementary rules of law" and, interestingly, made provision for the addressal of plebeian rights within its Tables. This codification gave equal rights within the law to both plebeians and patricians. As trade developed and foreigners became involved in legal disputes in Rome, a *praetor peregrinus* (magistrate of foreigners) was appointed alongside the *praetor urbanus* (magistrate of the city).

The *praetor peregrinus* applied both Roman law and the law of other nations in his findings and du Plessis & Kok (1990:8) note that:

*The early development of Roman law was mainly achieved through the work of the praetor peregrinus...the praetor, [who through] his power over procedure, did have the power to make law and change law.*

Interestingly for the purpose of the study at hand, Rome also employed a form of public participation in the making of law through the comitia or popular assemblies of the *Populus Romanus*. A comprehensive codification of Roman law was put together in the *Corpus Juris*, undertaken by a jurist and politician known as Tribonian. Titled the **Corpus Juris Civilis**, the completed work consisted of four separate parts: the *Codex*, the *Digest*, the *Institutes of Justinian* and the *Novellae Constitutions*.

These "four parts" for the first time brought together the enactments of the past Roman emperors which were still valid, passages in the treaties of the Roman jurists, Roman private law and finally, the enactment's of Justinian which were made after the promulgation of the *Codex Repetitae Praelectionis*. Du Plessis & Kok (1990:11) indicate that "Justinian ordered enactments to be passed which gave the *Codex*, the *Digest* and the *Institutes* the force of statutory law...[forming] an unalterable definitive statement of... law". With Justinian's death, the *Corpus Juris* became watered down in the East, whilst in the West it lay dormant for almost a thousand years, whereupon it was revived to become the foundation of common law of Western Europe, but excluding Britain.

### 3.3.2.2.1 The Roman law revival

As noted above, through Roman conquests Roman law permeated the legislation of the Western Empire where, together with the Germanic principles brought to bear by the barbarians, it blended into a rule of law which bore little comparison to the original Roman law to be found in the *Corpus Juris* of Justinian. The best known compilation of these principles are to be found in the *lex Salica* (Law of the Sea Franks) and the *lex Ripuaria* (Law of the River Franks), which compilations contained crude codes of Germanic law. It is of import to the development of law within South Africa to note that this blending took place in the Netherlands during the Frankish Empire in that country when Barbarians, rather than abolish Roman law altogether, tried to preserve it and to accommodate it within their various codes. It was this mixture of law which accompanied Jan van Riebeeck to the Cape.

### 3.3.2.2.2 Roman-Dutch law at the Cape

Hahlo & Kahn (1960:13) say that:

*...the statute law of the Cape...derived from five different sources, largely reflecting the hierarchy of authorities by which the Cape was governed....*

When van Riebeeck occupied the Cape, the general statutes which were already embodied in the common law of Holland, were received within South Africa as a part of the Roman-Dutch law. Hahlo & Kahn (1960:14-15) note what this meant as follows:

*Placaaten of the States of Holland issued after the date of settlement of the Cape in 1652 became law at the Cape if they were promulgated and acted upon there. In this respect our [S.A.] courts have adopted an approach which, while it is perhaps not entirely logical, has worked extremely well. In the case of a placaat which expressly purports to apply to the Cape or which is ex facie of universal application, promulgation at the Cape is presumed. In the case of a placaat which appears to have been of application in Holland only, being of a local or fiscal nature, promulgation at the Cape must be proved by the party who relies on the provisions of the statute. A placaat may be partly applicable at the Cape and partly inapplicable....another way in which rules contained in a statute issued by the States of Holland after 1652 could become law in South Africa [was] by incorporation in the common law.*

When the British took occupation of the Cape in 1806 Roman-Dutch law remained in place as common law, but was from this point on to receive a strong influence of English law. For example adoption of the English criminal procedure came with the promulgation of the First Charter of Justice in 1827. du Plessis and Kok (1990:19 & 40) tell us that in line with the

English model, the courts of the "Landdrost and Heemraden" were abolished and in their place came the "Resident Magistrate". The legal profession was divided between attorneys and advocates and trial by jury became the norm. The authors note that:

*A further definitive adoption of English criminal procedure took place with the promulgation of Ordinance 40 of 1828 and the English law of evidence was adopted by Ordinance 72 of 1830....English influence [was heightened by] lawyers who practised law and became judges at the Cape [and whom], were educated and trained in England...[and,] the doctrine of stare decisis [became] part of the law. [This adoption of stare decisis is important in terms of present-day South African law, in that its acceptance during this period, for the first time made provision for a system of binding and persuasive judicial precedents. Stare decisis provides the foundation for all practical applications of the principle of law and]...means that if a decision of a superior court has been arrived at in the light of a clear statement of law relevant to the facts before the court, then that statement of law is **the law** and is binding on all courts that are obliged to follow the precedents created by the court in question. The question as to which courts are bound by the previous decisions of which other courts is answered by referring to the hierarchy of our [S.A.] courts. Thus all South African courts are bound by decisions of the Appellate Division. The Appellate Division is bound by its own previous decisions...*

It therefore became the tendency to find in terms of Roman-Dutch law and then to accept English precedence on the point in question. (In passing, one should perhaps say that due to a certain influence of Roman law on both legal systems, English law and Roman-Dutch law did share some basic similarities.)

### **3.3.3. The Union of South Africa: its legislative development after 1910**

According to du Plessis and Kok (1990:21):

*With the formation of the Union of South Africa in 1910 the Supreme Court of South Africa was established. Roman-Dutch writers have, [since that time], been consistently consulted [and] Doctrines of English law that had become entrenched were retained [whilst] unnecessary importations have been eradicated.*

In admitting Roman-Dutch law as the basis of South African law, the authors however note that there have been conflictual approaches to the authority previously given to English precedents in the courts of South Africa. And they further indicate that since around 1950

there has been a tendency to systematically eliminate English doctrines and apply true Roman-Dutch law. This directive can be seen at work in the case of *S v Makwanyane* 1995(2) SACR 1 (CC) where the court *per* Chaskalson P, held that "South African Courts could derive assistance from public international law and foreign case law, but were in no way bound to follow it". (Para[39].) However, English law is still strongly apparent in various sectors of South African law, for example in company law and the law of insolvency. In other sectors of the law there is to be found what Du Plessis & Kok (1990:22) refer to as an "...inquisitorial innovation in our [S.A.] criminal procedure... which now has a strongly Continental flavour", for example "...the legal systems of the United States of America and the continent of Europe...". The authors relate this Continental influence to the efforts of academic lawyers who have since 1950 produced legal textbooks in South Africa on Comparative law, and they acknowledge in this regard that:

*One cannot escape the fact that the world has become very small, that there is a continuous interaction of legal systems and that our [S.A.] courts have no alternative but to seek guidance in other systems of law where our own authorities are silent, or clearly outmoded (1990:23).*

### **3.3.3.1 Judicial authority in South Africa**

It has been variously expounded above that the authority within South African courts comes from various sources, viz., the authority of either the Acts of Parliament or their subordinate law-making bodies, the Roman-Dutch writers (known as the old authorities), the *Corpus Juris Civilis* and the authority created by our [S.A.] superior courts in the forming of (interpretative) judicial precedent. Du Plessis & Kok (1990:28) are thereby able to state that authority is recognised to be "...a statement of the law which, depending on its source, will be either binding on the court or of persuasive value". In this respect, foreign law can be termed as authoritative in respect of its persuasive value and the authors note in this respect the input of English law into South African company law and the law of evidence saying that "English decisions on the law of evidence [and that of company law in certain circumstances] are still very strong authority in our [S.A.] courts.

Later in this chapter Nicolson (1992) argues that one of the important aspects thrown up by the importation of English law into South African statute, has been the judicial positivist stance taken by the judicial body in South Africa. Nicolson's argument can be said to pick-up with Van Der Merwe's debate on *inter alia*, the "inherent morality of the law", "qualified/unqualified punishment", "instrumental morality", "failed understanding of authority" and, the argument that the law is administered "mechanically". Nicolson (1992:64-65) says, amongst other things, that judicial formalism provided judges with:

*...a convenient cloak to mask their approval of state action. If one regards judicial formalism as the inevitable consequence of adherence to legal positivism, then this conclusion supports those commentators who have identified positivism as playing an important role in enabling judges to conceal their loyalty to the status quo. Many judges who indicate a willingness to promote human rights and racial justice were hamstrung by their perception of the accepted limits of the judicial function. And, where judges were ambivalent...judicial ideology filled the gap and counselled restraint*

Like Van Der Merwe, Nicolson is concerned with an ideological adjudication which revolves around what might be termed a cause and effect mentality, or a morality which only adjudicates in terms of facts. However, Nicolson (1992:65) says,

*Crude 'cause and effect' reasoning is avoided by, for instance, executive minded decisions [which are] explained as inevitable because of judicial backgrounds or prevailing political phenomena.*

Basically, what both authors are highlighting, is a form of judicial positivism which precludes the morality inherent within the laws of nature in favour of a concretised morality which suppresses liberal ideology by combining it with a judicial ideology of restraint. In other words, positivism in the South African context, can be argued to dilute (Nicolson would prefer negates) the morality and values inherent in common law doctrines. Below in section 4.1 Nicolson's ideas are applied to the judicial ideology in South Africa in more detail, but before considering the various influences of positivism on the law of the country further, it is important to be clear what Nicolson means by ideology.

### **3.4 THE DEFINITION OF IDEOLOGY**

Nicolson's (1992:50-51) definition of ideology takes up the writer's own view. He says:

*I do not use the term ideology in a critical sense to denote those ideas which are regarded as false representations of "truth", designed to serve particular political, economic or social goals. Instead, I see ideology in more neutral terms as the means by which individuals give meaning to all things and events which they encounter and all feelings which they experience. Individuals are not born with consciousness of the world. They acquire it from the social context in which they exist via the medium of ideology. Ideology is thus the terrain on which all individuals acquire consciousness of themselves and the world around them.... As well as denoting...structured ideas, ideology includes those elements of consciousness which arise spontaneously...and which take the*

*form of values, opinions, attitudes, assumptions [and] prejudices. Such ideologies are usually disguised rather than expressed aloud and manifest themselves to individuals as 'common sense'.*

By defining ideology in such a way, Nicholson takes up various notions of what is commonly known in sociological debate as the sociological imagination. He is referring to the dialectic relationship between people and the world in which they live - to that area of meaningfulness which does not directly relate to pure facts, but is rather dependent upon an intersubjectivity of divergent ideas in the world. This divergency results in differing notions of how society functions. Nicholson uses the ideas of those sociological authors whom one may call participatory theorists when he talks of "consciousness of themselves and the world around them". For example, Mead (1934), Schutz's (1973), Habermas's (1987), Darhrendorf (1969), Jean Paul Sartre (1973) and Berger (1969).

Ideology seen in this way can be argued to extrapolate the ideas of participatory theorists in its call for the input of the wishes of the citizens of Pretoria into sentencing policy/practice in South Africa. For example, one may consider Sartre's concept of freedom as the opportunity to participate in the formation of a sentencing policy which affects the individual lifeworld of South Africans. Thus Sartre (1973:41) says, "...he [meaning people] is...nothing else but the sum of his actions...there is no reality except in action...", something this thesis would argue can only be *truthfully* addressed when all have an equal voice. One can also see Schutz's (1973:13) taken-for-grantedness in operation in terms of statutes which are adhered to and applied without question, what Nicholson calls, "the mechanical declaration of parliament's intention", and Berger's (1969:20) "man made institutions" (for example the courts) which appear to have an external life - he says "...commonly apprehended by man as virtually equivalent to the physical universe in [their] objective presence..." (akin to judicial positivism), but which as man made, can be re-fashioned by other men - via, in this case, the inclusion of public wishes into sentencing practice.

Nicolson (1992:51) uses the concept of hegemony (which in its non-sociological form means "leadership"), in Gramsci's terms as "spontaneous consent" (see endnote 1 [p.92]) which consent means arrived at through the agreed upon opinions and beliefs of people. In the terms of this study hegemony is only attainable when the democratic right of all citizens to make their wishes known is taken account of - what was referred to in an earlier chapter of this work as, a legitimacy which carries the force of moral sanction reflective of the basic values of the individual.

Here it may prove interesting to briefly consider the work of Popper (1986) on Plato, and in particular Popper's reading of what he terms Plato's Totalitarian Justice, because it provides



yet another way of looking at individual/state legitimacy. According to Popper (1986:88-91), interpretations/translations of Plato's writings have been manipulated to fit in with a humanitarian bent which in relation to crime and justice, have skewed Plato's ideas. Popper (1986:88) argues that "This tendency begins with the translation of the very title of Plato's so called *Republic*". Popper says:

*What comes first to our mind when hearing this title is that the author must be a liberal, if not a revolutionary. But the title Republic is, quite simply, the English form of the Latin rendering of a Greek word that had no associations of this kind, and whose proper English translation would be The Constitution or The City State or The State.*

It was noted in section 2.1 [p.38] of the previous chapter that Plato believed punishment of wrongdoing was good, both for the individual and the society as a whole. However, according to Popper (1986) Plato had a particular ideal in mind when he considered the term justice, an ideal which can be argued to oppose Nicolson's use of Gramsci's *spontaneous consent*. According to Popper, Plato's humanitarian *justice* was not about equal treatment of citizens before the law, or about laws which show neither favour nor disfavour towards individual citizens or groups or classes, or impartiality etcetera - what Popper defines as the more general humanitarian outlook. But rather, in *Republic* "...[Plato]...used the term 'just' as a synonym for '...that which is in the interest of the best state'" (1986:89), which is more of a totalitarian outlook than a humanistic one. If Popper is right in his interpretation of Plato, that "Plato identifies justice with the principle of class rule and of class privilege...that the state is just if the ruler rules, if the worker works, and if the slave slaves", then Plato's concept of justice is fundamentally different from the ordinary view and different from Nicholson's view. Popper (1986:90) says:

*Plato calls class privilege 'just', while we usually mean by justice rather the absence of such privilege. But the difference goes further than that. We mean by justice some kind of equality of the treatment of individuals, while Plato considers justice not as a relationship between **individuals**, but as a property of the **whole state**, based upon a relationship between its classes.*

Hegemony in Plato's terms then would mean that legitimacy is tied to a broader concept of justice, a concept which is more holistic, involving the *whole state*, and this way of defining picks up on the Classical debate (and Plato's views therein) expressed in Chapter 2 section 2.1 earlier, and is somewhat oppositional to the debate above on the legitimacy of participatory justice and Nicolson's view of hegemony.

Nicolson's debate on hegemony as a legitimate consent is undertaken from a Marxist standpoint. Even so, his ideas on legitimate leadership, in the form of what he terms "ideological apparatuses" such as parliament and the courts, are informative to the debate at hand because they provide, in the case of South Africa, insight into how the judicial process has functioned in the past and how this process needs to change to accommodate the new democracy which is binding within the interim (now New) Constitution of the country. He says that the key to understanding a judge's behaviour lies in understanding the conflicting ideologies which lie behind such behaviour. In saying this Nicolson (1992:52) indicates that such a need does not deny the effect of a judge's personality on decisions taken, what he terms his "...unique psyches, emotional make up and biographies of social experience [which] most surely determine their reactions to ideological influences", but rather takes up another sociological nuance: that dominant ideologies insidiously infiltrate one's selfconsciousness. Nicolson (1992:56-57) says:

*The more pervasive an ideology, the more likely it is to appear as 'common-sense' [note the Schutzian reference], rather than a subjective point of view. Because liberal ideologies were not widely accepted amongst whites, they were unlikely to become part of their [the judges] subconscious values, attitudes and assumptions. Instead they were easily identifiable as personal philosophies. As such, judges would have considered that upholding their own liberal ideologies, instead of legislatively sanctioned racist and repressive ideologies, conflicted with their perceived duty to apply the law, rather than their personal preferences. This would have occurred increasingly as authoritarianism, discrimination and oppression began to characterise political and social life*

This point is of import in terms of the debate undertaken in section 4.1.2 to follow on the Janus-headed view of morality and the mechanistic view of criminal law.

### **3.4.1 Ideology and judicial attitudes**

Nicolson (1992) defines three broad types of ideology, viz., societal, legal and judicial. Only his judicial ideology need concern us at this point. Judicial ideology is, according to Nicolson (1992:53):

*...a set of assumptions and beliefs about the judicial function...reflected in the mode of reasoning which [judges] employ...[and] deals with... issues such as judicial precedent, statutory interpretation, and the relationship between the courts and other organs of government.*

Nicolson's argument is complex in this regard and it will not prove informative to the study at hand to delve too deeply into his debate. It is Nicolson's belief that South African judges have failed to keep abreast of the changes in sentencing practice, especially in the area of individual human rights. He intimates that they have chosen to remain behind parliamentary statutes, preferring to believe that "...the wisdom, policy and merits of state action were beyond the judicial domain...". A position which can be argued to uphold the democratic principle of majority rule which presumes that public policy reflects the will of the majority. Nicolson (1992:63-64) makes an interesting observation concerning democracy and judicial ideology - an observation which picks up on the importation of English law discussed above. He says:

*Judicial ideology in South Africa was heavily influenced by the restrained and formalist judicial ideology of the late nineteenth and early twentieth century English judges. This was to be expected given the dominance of English legal thought at this time. But it was certainly tragic that the full rigours of judicial restraint and formalism were applied in a legal system not blessed with the constraints placed on power by democracy, political stability and long-standing constitutional conventions. Racist societal ideology ensured that South African judges accepted the denial of political rights to the majority of South Africans and hence failed to appreciate the significance of the fundamental differences between the South African political system and the paradigm for which the restrained arbitral role was conceived. And to add insult to injury, deference to parliament and local authorities was occasionally justified on the basis of democratic principles.*

Before looking more closely at this criticism one needs to have an idea of how the administration of justice takes place in South Africa.

### **3.4.2 The administration of justice**

According to du Plessis & Kok (1990) South African courts can be divided into two main sections, the superior courts which are the various divisions of the Supreme Court of South Africa, and the lower courts which are the courts of magistrates and regional magistrates. In this respect the courts system in the country is like other penal jurisdictions: the administration of justice through the courts system is hierarchical by nature.

Keyter in the South Africa official yearbook (1992:43-53 [variously]), notes that sovereign legislative authority is vested in the State President and Parliament. Attorneys-general are appointed by the State President and have the power to prosecute on behalf of the State. A private prosecution is taken up in the same way as a prosecution by the State, except that defence costs must be paid for by the litigant - unless otherwise directed by the court on

completion of prosecution - and the State can, at the discretion of the Attorney-General, take over the prosecution in the name of the State at any stage during the proceedings.

Since certification of the New Constitution on December 5 1996, The Constitutional Court is the highest court in South Africa, followed by The Supreme Court of Appeal (the Appellate Division) and the then The High Court, previously known as The Supreme Court. The Appellate Division is composed of the Chief Justice and "as many judges of appeal as the State President may determine". As its name infers the Appellate Division is purely a court of appeal: it does not hear trials. There are six provincial divisions which are specified by the Supreme Court Act, 1959, administering jurisdiction over all people and matters within their specified areas. "These divisions hear matters that are usually of such a serious nature that the magistrate's or regional court would not be competent to impose an appropriate penalty. Except where minimum or maximum sentences are laid down by law, their penal jurisdiction is unlimited and includes the death sentence [abolished as at 5.12.96] as well as life imprisonment in certain specified cases" (South Africa Official Yearbook, 1992:44).

South Africa is divided into regional districts, each with its own regional court which, unlike the Supreme Court, operates within a jurisdiction which is limited by legislation. Although higher in the hierarchy of courts than that of the magistrate's court, the regional court cannot impose an imprisonment sentence of more than 10 years or a fine of more than R40 000. This stated, It is reasonable to say that the bulk of State penal administration falls under the magistrate's court system and South Africa has 309 magistrate's offices, 1 014 magistrates, 1 196 prosecutors and 3 717 officers of other ranks (South Africa Official Yearbook, 1992:44).

As already noted, the Appellate Division has jurisdiction to determine appeals against any decision of the court of a provincial or local division, and in terms of the death penalty (abolished by certification of the New Constitution on 5.12.96, but operational at the time of the survey), the accused had an automatic right of appeal to the Appellate Division. In relation to the sentence of death, the Minister of Justice could refer the case to the Appellate Division to review the proceedings in the Supreme Court. In this respect, decisions of the various divisions of the Supreme Court of South Africa formed an important source of law (rather reminiscent of the remarks made earlier in section 3.2 by Lord Radcliff and Lord Denning [in Hall 1987:134], that the law must be interpreted before it can be applied) because the function of the judge in the Supreme Court of South Africa, although not at liberty to make new laws as such, must interpret, explain and apply existing common law, rules and legislation. Of this point the yearbook (1992:43,44) says:

*In many cases a judicial decision establishes a new rule of law by interpretation and is thus termed judge-made. Decisions of the Appellate Division of the*

*Supreme Court are binding (see section 3.2.2.2 earlier on binding precedent) on all courts of a lower order and, likewise, the decisions of the provincial and local divisions are binding on magistrate's courts.*

Other civil courts included the small claims courts, brought into being by Act 61 of 1984, and chief's courts. The small claims court was intended to offer speedy and inexpensive penal decisions whilst the chief's court was intended to handle informal judgements on civil claims arising from indigenous law and custom. Since December 1996 a new Consumer Court has come into being.

Returning to the earlier debate, and in order to give perspective to Nicholson's view that South African judges have failed to keep abreast of changes in sentencing and have chosen to remain behind parliamentary statutes, Keyter (1992:43) says:

*South African legislation is constantly revised, developed, adapted and supplemented to meet changing circumstances....This is done by Parliament on advice of the legal sections of various state departments, but primarily by the South African Law Commission. The Commission undertakes research in all branches of the law of the Republic and makes recommendations on its development, improvement, modernisation or reform. This includes the repeal of obsolete and unnecessary provisions; removal of anomalies; promotion of uniformity in the law as applied in various parts of the Republic; consolidation or codification of any branch of the law; and steps to make common law more readily available.*

However, in the conclusion to his work Nicholson (1992:64) states,

*...perhaps the most important reason for the disappointing record of the South African judges on race relations and human rights was the way in which the dominance of illiberal societal ideologies combined with the judicial ideology of restraint. The pervasiveness of illiberal societal ideologies meant that many unenlightened judges applied them without consciously contravening their accepted judicial role while judicial formalism provided others with a convenient cloak to mask their approval of state action.*

Nicolson (1992:65) maintains that despite the South African Law Commissions criteria to develop, adapt and supplement statute to accommodate changing circumstances in a dynamic and developing society, judges are encouraged to:

*...abstain from review, to apply law mechanically, to avoid moral and political issues, to leave legal development to parliament, to defer to legislative sovereignty and to interpret statutory provisions literally.... [Thereby] judicial ideology ensured that law was presented in terms favourable to the holders of political power....*

Here Nicholson's ideas can be argued to reflect the theoretical debate undertaken in the previous chapter, Chapter 2. The application of law in a *mechanical* fashion which *favours the holders of political power* can be argued to reflect the positivistic nature of South African law. The post-apartheid Constitution now contains a reforming Bill of Rights, the ideology of which should permeate the present judiciary and, as Nicholson (1992:67) indicates, "...should become part of the legal ideology with which all law students [are] inculcated". But until this change takes place it can be argued that positivistic ideology has, in one form or another, been the benchmark of the administration of justice in South Africa.

### **3.4.3 Judicial positivism: the law of nature and human rights**

Picking up on the debate of the previous chapter, Nicholson's concern about the *mechanical* application of law in South Africa can be linked to Van Der Merwe's argument (see Chapter 2, section 1 [pp.35-36]) concerning the morality of law, and furthermore the ideas of Letwin (in the same section), on the instrumental view of morality. All three authors (Nicholson, Van Der Merwe and Letwin) are concerned with an application of the law which can be conceived of as judicial positivism. A concept which in application dilutes (or negates) the morality and values of common-law in favour of what Van Der Merwe, again in the same section, calls a "failed understanding of authority". This way of seeing basically juxtaposes the concepts of judicial positivism and the law of nature. In this respect Van Der Merwe (1991:3-2 & 3-3) intimates that instrumental morality can be argued to further the legislative function within society. He says:

*...this instrumental morality is the logical end product of the trend, starting centuries ago, away from the spiritualistic or 'other-world' approach, towards...the 'this-world' approach of the naturalists....Unfortunately a result of this development has been steadily to erode the idea of morality as a set of standards for conducting oneself, and to the transformation of morality into an action programme...[say] for the elimination of poverty. Coupled with this has been an ever-increasing concentration of power in the hands of a central government, which in turn has led to a greater emphasis on legislation, rather than common law, and on strict liability rather than liability for fault.*

In other words Van Der Merwe is suggesting here, that morality which once had to do with religious obligation now has more to do with legislation and liability. Letwin (in Van Der Merwe 1991:3-2) suggests in this respect that:

*...the new normative philosophers see men and women, not as independent agents distinguished by a capacity for ordering their experiences as they choose, but as parts of an enterprise with a preordained end.*

Perhaps the simplest way of explaining this juxtaposed argument is to begin by re-considering Van Der Merwe's discussion of morality within the law. It was indicated in the previous chapter (Chapter 2, section 1.0), that morality within criminal law can be seen as what one might here term "Janus-headed". Van Der Merwe (1991:3-2) in quoting Letwin on the justice inherent in law which enables men to live in a particular kind of association which could not be otherwise maintained, touches on what this might mean. The law has an equal mandate to ensure an ordered (crime free) society and yet, at the same time, to provide for each individual a society in which all have justice. Such a notion provides the judicial authority with what Van Der Merwe (1991:3-2) says is "...actually...a moral content to positivism..." and this form of morality is oppositional to the view of those Letwin calls the moralists "...who have only an instrumental view of morality". Drawing on Nicolson's argument concerning the misuse of power and authority in South African judicial legislation, one can proffer the idea that the moral content of positivism has, like the "moral content of punishment", somehow become confluent with, in this case, the inherent morality within common-law.

Looked at in this way, this argument is about the difference between judicial positivism and the law of nature or, what Nicolson (1992:53) calls the legal ideology as opposed to the societal ideology. In explaining the difference, Nicolson says that legal ideology pertains to the values and beliefs which underpin the rules and principles of the legal system (this definition overlaps in places with Nicolson definition of judicial ideology dealt with earlier: judges act in terms of what they *believe* is their role and this is reflected in their mode of reasoning), whilst societal ideology:

*...comprises a broad spectrum of economic, political and cultural ideologies, covering a wide variety of issues ranging from race and gender relations, the value of the Rule of Law, and law and order in society....*

Alternatively one could discuss illiberal as opposed to liberal judicial morality. Nicolson (1992:54) argues of course that the adherence to an illiberal ideology allowed the judiciary to, as was noted earlier, promote state power by "...[hiding] (not always successfully) their approval of state action behind the doctrines of legislative sovereignty and judicial neutrality".

Be this as it may, illiberal ideology is antithetical to the liberal judicial role which, according to Nicolson (1992:54) would address the human rights issues of dignity, liberty, justice, absolute natural rights, and he says:

*...as well as even rarer statements like those referring to the need to promote 'free and constitutional government' and a 'healthy, progressive and democratic society'.*

Obviously, this type of society is only possible for Nicolson when "there is fundamental freedom for all before the law without distinction as to race, sex etcetera", and having said this, one should remember that *all* means the offender as well as other members of society. How far the Bill of Rights within the Constitution will go to addressing these fundamental freedoms, without throwing the axis completely the other way (as one may argue has happened in the United Kingdom where it can be said that too much democracy and too many rights have led to headlines like "This cry for rights is just plain wrong" [in The International Express, September 4, 1996]), one will just have to wait and see. On this point Nicolson quotes Forsyth (in Nicolson 1992:69) as saying that:

*...the controversial and politicised nature of Bill of Rights disputes [can] mean that the constitutional court's decision would always be criticised on political grounds; this would prevent it developing a reputation and tradition of independence; which in turn would render it liable to become 'naught but a political plaything'.*

Nicolson disputes Forsyth's claim that the development of a tradition of independence will be seen as politically biased saying that "[T]his seems to confuse independence with objectivity". He says,

*No court can decide issues objectively least of all one interpreting a Bill of Rights. But that does not mean that a constitutional court will lose its independence or even make political decisions free of legal constraints. Indeed, it is possible that the greater the criticism of the court from different sides of the political spectrum, the greater will be its reputation for independence. The United States Supreme Court has shown a willingness to reach decisions unpopular with both government and public opinion and this has increased rather than decreased its prestige (1992:69).*



Whatever one's opinion on Nicholson & Forsyth's concerns, changes within South African courts are taking place in relation to fundamental human rights as the following section highlights.

Giving consideration to the South African Constitution, the case of *S v Makwanyane and another* (1995(2)SACR(CC)) shows the effects of fundamental human rights on our (S.A.) Constitutional Court and one might suggest, highlights the Court's attempts to find in accordance with The South African Constitution and at the same time give due consideration to the wishes of the South African public and the U.N declaration of human rights.

In the case of *S v Makwanyane and another*, the accused were convicted in the Witwatersrand Local Division of four counts of murder and one count of robbery with aggravating circumstances. They were sentenced to death on each of the counts of murder and to long terms of imprisonment on the other counts. The accused appealed against sentence to The Appellate Division, which appeal was dismissed and sentence was upheld.

Chaskalson P, taking cognisance of the pre-Constitution debate on the death penalty, the disparity in the laws governing the imposition of capital punishment in parts of South Africa (with reference to the abolition of the death penalty in Ciskei and the provision in s 229 of the Constitution that existing laws in the national states would continue to be in force), and judgments of foreign courts and international tribunals on the subject, stated that:

*In dealing with comparative law it had to be borne in mind that it was the South African Constitution which had to be construed and that this had to be done with due regard to the South African legal system, history and circumstances, and the structure and language of South Africa's own Constitution (1995:3).*

The Court, in considering the Human Rights Committee of the United Nations proposition that the death penalty is cruel, inhuman and degrading, ruled that such issues depend upon attitudes within a particular society and the application of that society's Constitution. The Court noted that South African society (encompassing the general public's attitude) does not regard the death penalty as inhuman or degrading and that "Public opinion...in itself was no substitute for the duty vested in the courts to interpret the Constitution and to uphold its provisions without fear or favour". Therefore, South Africans having committed themselves to a society founded on the recognition of human rights had to give due consideration to the fundamental rights of life and dignity, s 11(2): valuing these two rights "...as the most important of all human rights and the source of all other personal rights" (1995:5). (See endnote 2 [p.92].)

Taking up the issue of retribution, the Court held that "We have long outgrown the literal application of the biblical injunction of 'an eye for an eye, and a tooth for a tooth'" (1995:52) and that retributive concerns:

*...ought not to be given undue weight in the balancing process...South Africa should be a society that wishes to prevent crime...not to kill criminals simply to get even with them (1995:5).*

The Court further held that this balancing process had to take account of, on the one hand, the public demand for retributive justice to be imposed on murderers, and on the other, the existence of an alternative punishment for murder which is just as severe, viz., the sentence of life imprisonment (upheld by the survey public and the sentencing guide provided in Chapter 7, to follow). What this debate basically amounts to is the fact that retribution is no longer seen in as important a light as the individual fundamental right to life and dignity under the Constitution. This "finding" in itself is, in the case of South Africa, innovative, and echoes what Tak (1994) refers to in the previous chapter as the need for criminal policy to pay attention to the way of implementation and the extend of dignity afforded to the human person.

#### **3.4.4 Constitutional democracy and accountability**

Notwithstanding the argument presented here, a constitutional democracy still has to be accountable, and in the terms of this study, accountable to both the state and the citizens represented by that state. Such accountability is not possible unless the judiciary are at one and the same time perceived to be independent of state control and representative of the people it serves. This balancing between state and society is crucial to a successful democratic function. However, Nicolson (1992:70) has yet another warning. He says in this respect that, "...too much accountability and the judiciary becomes the tool of the democratic majority, too much autonomy and the judiciary loses the democratic legitimacy necessary to justify its powerful role" (a similar argument to that propounded above concerning democracy and rights). To overcome the accountability problem Nicolson (1992:71) suggests that:

*...judges need to become prepared to consider information and arguments other than those traditionally regarded as legally relevant. The responsiveness of a Bill of Rights to South Africa's problems can be greatly improved if its interpreters draw upon social scientists and other non-legal experts [and are also] prepared to listen to the views of those likely to be affected by their decisions.*

Responsiveness does, in the light of section 4.1.3 above, appear to be taking hold within South Africa's courts, but this, according to Nicholson, in the past was not always the case within the juridical forum in South Africa.

### 3.4.5 Theoretical influences: the juridical forum in South Africa

To return to the theoretical debate, if one accepts Nicholson's *reading* of law in South Africa, the juridical forum appears to have acted in terms of a state control, what Van Der Vyver (1988:64) says has been:

*...a 'total onslaught' which...has already exceeded the divide where the maintenance of law and order can no longer be orchestrated under the protective guidance of the rule of law and the due process of law.*

He refers to this as a form of Machiavellian (what the writer terms elsewhere as a form of Janus-headed) state power, a utilitarianism which derives its moral tenability from a biased weighting of gain relative to state control which does not recognise the justification of for the good of all . Furthermore, one can argue that a judiciary which is favourable to the holders of political power rather than each and every citizen of a particular state, is a far cry from the Classical ideology of a social contract providing for a joint responsibility between society and the individual in terms of crime and crime control.

On the other hand, South Africa's judicial process is surely based upon both Classical and Utilitarian influence imbued as it is by its influence from Roman-Dutch and English law. But once again we can identify a one-sidedness in favour of state criteria. Firstly, it is difficult to identify a juridical function which *truthfully* administers a social contract, because until very recently only some of the citizens have taken part. And, secondly, it can be argued that punitiveness has not been *truthfully* administered because of a) the exclusion of the disenfranchised masses and b) an Orwellian slant whereby it can be suggested, some have received more punitiveness than others. In this respect, both the "promotion of state power" and "Orwellian inequality" were, according to Nicholson (1992:54-55), upheld by:

*...prompt and unfettered action[s] like the banning of a prominent anti-apartheid campaigner [which] was 'manifestly necessary' to prevent the formation of racial hostility.... [or likewise]...the refusal to an African of permission to reside in a portion of a black location set aside for 'coloureds' [which] was upheld simply because it was a 'notorious fact' that the location had always been segregated.*

This type of argument appears to support the indication that the judicial function in South Africa has not promoted respect for individual human rights and thereby upholds Nicolson's notion of a mechanical law application which he argues is part of an illiberal ideology.

In this respect Van Der Vyver (1988:63) makes the following points:

1. The South African government [was] not a democratically elected or representative authority [owing] the mandate of its dominion to a relatively small and racially defined minority group.
2. The South African regime has over the years systematically abused its political trusteeship by pursuing a policy and legislative programme of institutionalised injustices, designed to safeguard the interests of the white minority...
3. The repositories of political power in South Africa have never excelled in the art of lending an ear to the grievances of the disadvantaged sections of the population, but, instead, in a consistent pattern of repressive strategies, sought to silence the voices of legitimate protest
4. The official policy of racial discrimination and the unyielding responses of the South African government to sound protests have been condemned in the strongest terms by literally every other member of the international community of states, the promotion and implementation of that policy constitutes a crime in international law...

Although it is not the prerogative of this study to explore this debate further, one or two examples are necessary to defend the argument for public involvement in juridical sentencing policy-making. In this respect, a literature study of the methods used by the state in South Africa prior to the democratic elections of 1994 provides more than ample *evidence* in support of such an argument. For example, the Rabie Commission on detention and interrogation which led to section 29 of the Internal Security Act 74 of 1982 and the statement by Dr Connie Mulder, the then Minister of the Interior, who said that when state security is at issue, rules are not. Van Der Vyver (1988:67) quotes The Minister at the National Party congress of Natal in November 1976 as saying:

*If it becomes necessary to choose between the freedom of the state and the freedom of the individual, we will choose the freedom of the state and abandon the freedom of the individual.*

This type of state intervention Van Der Vyver (1988:66,67) proclaims as totally against the initially moral righteousness of utilitarianism, saying it is not "...indicative of the considered computation of benefits and disadvantages required by the Benthamite variety of utilitarianism" - what he suggests early on in his writings to be more the Machiavellian credo of "...[an] application of any measure...that might seem expedient for the purpose of safeguarding the station and powers [of] state authority...". Here, the measures introduced by the state in the early 1960s concerning detention without trial provided many safeguards which some would argue led to the suspicious premature deaths in detention of for example, Steve Biko in September 1977 and Dr Neil Aggett in February 1982. Measures which whatever one's leanings regarding the politics of South Africa, once again, appear to have little to do with utilitarian ideals, classical theory or the proviso for individual human rights as discussed in chapter 2 of this work.

Whatever one believes in this respect, the sentencing policies employed by the South African courts led to sentences which, whether just or not, fed South African prisons to overflowing and reflected the global increase in punishable offences.

It appears that the discussion has come full circle, having met once again one of the initial concerns of this work, the problem of prison overcrowding. Prison overcrowding calls for a reformed sentencing policy which Klofas et al (1992:172) call "...a chronic condition to be managed rather than an acute problem to be resolved". In this respect Koehler & Lindner (1992:12) argue that:

*The impact of institutional crowding is destructive...[for] inmates and [can] endanger public safety through the early release of potentially dangerous offenders...[whilst at the same time producing] insatiable economic demands...both in terms of operating costs and the construction of new cells....*

Correctional crowding is one of the most important problems to be faced by criminal justice practitioners globally. Klofas et al's term management can be applied to Benekos's (1992:4) "...[restructuring of] state sentencing policy from indeterminate to determinate...". Notwithstanding the effects of either on prison populations, both policies can also be argued to involve various other peripheral dilemmas for judicial bodies.

For example, according to Benekos (1992:4-5) liberals argue that the discretion of indeterminate sentencing "...[violates] the 'rights and liberties of incarcerated offenders'", partly because it results in sentence inequities. Also it was noted earlier that conservatives argue indeterminate sentences result in a "coddling" of criminals. On the other hand,

determinate sentencing can be questioned in terms of providing for legislatively established sentence schedules which, whilst they can be said to address concepts like certainty, proportionality and fairness in criminal sentencing, can still be said to fail through a lack of judicial autonomy and discretion. Notwithstanding these debates, as was indicated earlier, the public would appear to be wholeheartedly behind a return to a more determinate get tough model of sentencing. This call for a return to determinate sentencing, is shown in a later chapter, to be borne out by the research undertaken.

In the chapter to follow the effects of these polemics in relation to sentencing are debated in terms of the success or failure of sentencing policies to, a) "manage" crime and the criminal in society, and b) to address public concern in relation to the contemporary call for a more get tough sentencing policy.

### 3.5 CONCLUSION

In this chapter the formation of the Republic of South Africa was discussed together with the evolution of its laws and the ideologies behind sentencing practice in the country. The chapter to follow looks in greater detail at the effects of sentencing policy and, in particular, to what one might call, in view of the publics' call for harsher more punitive sanctions, the failure of sentencing policies to address the crime problem in South Africa, the United Kingdom and the United States of America.

#### ENDNOTE 1

Hegemony is a Marxist term used in sociology - defined by Cavadino & Dignam (1992:59) as an *ideological domination*. Therefore, as a form of **spontaneous consent**, hegemony is extrapolated by Nicolson to show society's backing for parliamentary decisions.

#### ENDNOTE 2

In March 1992 the then Minister of Justice announced that the policy in regard to the death penalty\* might be addressed by the New Constitution and a Bill of Fundamental Rights, and that pending the outcome of negotiations, execution of the death sentence would be suspended in South Africa. The moratorium was only in respect of carrying out the sentence of death, not the imposition thereof. Therefore, South African courts continue[d] to impose the death sentence in cases in which it was considered to be the 'only proper' sentence. The following order was made:

1. In terms of s 98(5) of the Constitution, and with effect from the date of this order, the provisions of paras (a), (c), (e) and (f) of s 277(1) of the Criminal Procedure Act, and all corresponding provisions of other legislation sanctioning capital punishment

which are in force in any part of the national territory in terms of s 229, are declared to be inconsistent with the Constitution and, accordingly, to be invalid.

2. In terms of s 98(7) of the Constitution, and with effect from the date of this order:

(a) the State is and all its organs are forbidden to execute any person already sentenced to death under any of the provisions thus declared to be invalid; and

(b) all such persons will remain in custody under the sentences imposed on them, until such sentences have been set aside in accordance with law and substituted by lawful punishments (1995:59).

\* The death sentence was declared unconstitutional by the Constitutional Court on 6 June 1995 ref: *S v Makwanyana and another* 1995 (2) SACR (CC), and was certified into law via the New Constitution on 5 December 1996: by retaining the already existing terminology. It should be noted, however, that the final Constitution did not say anything directly about the death penalty, but by ratifying the interim Constitution, by implication, it ratified the decision of the Constitutional Court in *S v Makwanyana*, by interpreting the interim Constitution.

## **CHAPTER 4**

### **AN EVALUATION OF THE DIFFERENT FORMS OF PUNISHMENT**



## CHAPTER 4

# AN EVALUATION OF THE DIFFERENT FORMS OF PUNISHMENT

### 4.1 INTRODUCTION

In previous chapters of this work the emergence of two criminal justice systems were traced, namely, the criminal justice system of the United Kingdom and the criminal justice system of the United States of America, in order to evaluate the criminal justice system within South Africa. It was variously shown that these systems have evolved from similar theoretical platforms. An indication was also given, that due to certain failures - for example that imprisonment merely addresses the short term crime problem and is expensive - punishment and sentencing are having to evolve ways to sanction offenders outside of the prison establishment.

This chapter looks in some detail at the different punishments available to the courts and assess their potential for *success* on several fronts. For example, consideration is given to different punishments in the light of their ability to reduce crime, the costs involved and the potential for reducing fear and anxiety within the public sector. The chapter then moves on to consider the findings of the British and American crime surveys - utilising where applicable, the United Nations International Crime Survey 1993 and the report thereof - to look at public perception of punishment penalties, using the resultant discussion as a platform from which to consider the South African survey research undertaken for this thesis.

However to begin with, the chapter gives consideration to why there appears to be a global need to reduce the use of imprisonment, and uses literature to show that internment can, for various reasons, be argued to be something of an ambiguous sentence option.

#### 4.1.1 Prison overcrowding: the need for alternative punishment sanctions

Primarily, the need for non-custodial sanctions can be related to two areas of concern. The first concern is the ever-rising prison population. Taking the work of Parker et al., (1989:166) as an example, one can see just what this rise in prison numbers means in the English context:

*In September 1986 the United Kingdom's prison population stood at just under 54,000. This is the highest prison population both in absolute numbers and as a proportion of inhabitants of any EEC country.*

Parker et al. (1989:166), using the Conseil de l'Europe 1987 figures, clarifies the position like this:

*While West Germany (down 18 per cent), Sweden (down 12 per cent) and Italy (down 11 per cent) all managed to reduce their prison population per 100,000 inhabitants between 1983 and 1987, England and Wales produced an 8 per cent increase; with Scotland and Northern Ireland performing similarly.*

In the United States, Beck & Gilliard (1995) provide knowledge of like increases in prison population. In this respect they say:

*Since 1980 the Nation's prison population more than doubled on a percapita basis. On December 31, 1994, the number of sentenced prisoners per 100,000 U.S. residents was 387 - up from 139 in 1980... [meaning that] at yearend 1980 1 in every 453 U.S. residents were incarcerated; by yearend 1993 that figure [had grown] to 1 in every 189. Although the percentage of State prisoners serving a drug sentence more than tripled from 1980 to 1993 (6% to 22%)...(up 55,500 from 1990 to 1993), the number of violent offenders grew the most (up 82,100 for the same period). Between 1980 and 1993 the Federal prison population grew at a faster rate (an average of 9.9% per year) than the combined State populations (8.2%)...[and] [O]n December 31, 1993, almost 4.9 million persons were under some form of correctional supervision, including 2.8 million adults on probation and 671,000 on parole.*

Whilst in South Africa, Bruyn indicates that according to the latest figures published in the Department of Correctional Services Annual Report, 1996:

*On 31 December 1995, the Department had 112 572 prisoners in custody, of which 27 320 (24,3%) were unsentenced persons and 85 252 (75,7%) were sentenced prisoners.... Against the background of the current overpopulation, the fact that the number of sentenced prisoners increased by 27% during the period June 1995 to December 1995, is cause for concern" (1996:5).*

This "cause for concern" has, according to Bruyn (1996:12), been aggravated by the closure of some nine prisons in South Africa during the year December 1994 to December 1995 because they do not comply with standards for humane detention and could not be viably restored. The reduction in available cell accommodation during the year under review has meant that "[O]n 31 December 1995 the Department had cell accommodation for 94 381 prisoners as opposed to available cell accommodation for 95 695 prisoners as at 31

December 1994" (1996:5). These figures, when placed against The Department's April 1996 reported prison overpopulation figure of 27 percent (see section 1.1, chapter 1[p.3]) can be argued to uphold Koehler and Lindler's concern that prison overpopulation is a continuing "long term problem", and indeed Bruyn's 1993 proposition that "[W]e have in our country [S.A.] one of the highest per capita rates of imprisonment in the world, surpassed only by the USA..." (1993:279). Doubly worrying for South Africa, is as noted above, the rate of increase in overpopulation: 27 percent increase of sentenced prisoners during a mere 6 month period.

Bearing the above figures in mind, Parker et.al. relate the rise of prison numbers in the U.K. to some interesting points which can very readily be likened to the global situation concerning prison overpopulation. For example, they say of the 1982 and 1988 Criminal Justice Acts in the U.K. that:

*...it is probably safe to regard these two statutes, along with the Police and Criminal Evidence Act 1984, with its concerns about correcting 'lenient' sentencing...[as keeping] faith with the 'get tough' harsher sentencing pronouncements of the 'law and order' lobby, which start with custody as the punishment and judge all other measures through comparison (1989:167).*

What this law and order lobby means for government, the juridical body and the public, is brought home with these words:

*When the financial costs of the law and order programme are set against the crime picture, the results are plain. The last few years have seen both the crime rate and public concern about its increasingly violent nature rise sharply. ...the failure of the whole approach is becoming more and more apparent (1989:167).*

And Lowe (1987:8) suggests that whatever the effects of prison overcrowding, a National Academy of Sciences panel in the U.S.A found little immediate possibility of relief from population pressures in sight, a situation emulated by Bruyn's (1996:5) "cause for concern" in South Africa.

The second concern is directly related to the first. If penal policy is to keep prison numbers down, and at the same time be seen to address the rising crime problem through its punishment policy in a way which gains (or achieves) public support, then Parker et al. (1989:166) are justified in claiming that "... penal policy is at a critical point".

Earlier in this work, it was shown that the United Kingdom employs what might be called a protracted mechanism for legislative change/reform, what Thomas (1993) termed a *piecemeal process*. This process can be summarised in Thomas's (1993:12-14) words as follows:

*Anyone coming to the study of English sentencing law for the first time would be struck by the quantity and complexity of the legislation involved. ...the piecemeal approach to sentencing law reform which has characterised English sentencing legislation since 1948 has resulted in a maze of statutory provisions spread among a large number of statutes, many of them amended so frequently that they bear little or no relationship to the provision as originally enacted; it is often difficult to be confident of the correct text of a statutory provision (let alone its interpretation), and the problem of establishing what law applies in a given case is made more difficult by the fact that statutory provisions are often enacted but not brought into force, or brought into force on different dates, or with modifications.*

*The preference for long Criminal Justice Bills dealing with a variety of different topics, which tend to increase in length as they pass through... Parliament [with] Ministers and others [having] second or further thoughts, means that the finished legislation is often technically deficient in detail and requires instant amendment or patching up.*

One may be able to suggest that piecemeal legislation is partly why prison numbers have increased in the U.K. whilst other jurisdictions have managed to lessen their prison intake, because change/reform is a protracted business. Also it was noted that English law affords greater discretion to judges and the courts to sentence offenders in relation to *due precedent* as opposed to pre-defined rules, so one has the added problem of subjectivity in sentencing. In this respect various research into judges' discretionary powers, for example Tarling, Parker, and Ashworth et al., (in Parker et al. 1989:17), show that not only objective factors are involved with sentencing, but also personal philosophies, attitudes and beliefs towards crime and punishment. Whatever one's personal beliefs on discretionary power, one has to admit that whilst it invokes a feeling of fairness to each individual, it does seem in many cases, to cause problems in terms of disparity between courts. Parker et al's. (1989:17) research indicates that this lack of consistency in sentencing: "...[calls] into question whether such wide discretionary powers can ever be justified". On the other hand judges' object to the notion of less discretion and more rules. This restriction on discretionary powers Pitfield (1994:55) argues is seen by judges' as a threat to autonomy or an attack on their professional and specialist independence. To back this argument for autonomy, Ashworth et al. 1984 (in

Parker et al. 1989:17) indicates that English judges' "... own description of their basic approach to sentencing...laid stress on the idea that 'every case is unique'....[N]o two cases are the same...". According to Parker et al. (1989:17), even the notion of tariff sentence (the nearest the English system comes to the American one) is viewed by English judges in "...derisory terms as 'slot machine justice'".

In relation to the U.S.A., the earlier discussion revolved around the implementation of sentencing guidelines. It was noted that this jurisdiction, faced with the same problems (rising prison numbers) and the same theoretical history, has in many states opted for sentencing guideline grids. The use of sentencing grids, whilst they might be shown to lessen disparity do however appear to increase, not to lessen, prison numbers. In this respect Pitfield (1994:59) indicates that in line with the initiative for guidelines to impose a 'get tough' criterion, prison populations continue to rise :

*In January 1984 (pre-guideline) half, 48,6 per cent of federal sentences in the U.S.A. resulted in imprisonment and there was a steady increase until early 1987 when the figure was around 55,57 per cent. After the guidelines were declared constitutional in January 1989, the proportion of defendants sentenced to imprisonment jumped to 60 per cent. In terms of prison populations, the figures range from 25,000 people in federal prisons in 1980, 44,000 in 1988, 59,000 in 1990, with a U.S. Sentencing Commission estimate of between 80,000 and 135,000 by the year 1998.*

However, there are other reasons why a prison sentence is not always the most optimal punishment.

#### **4.1.2 Imprisonment as a *punishment*?**

It is well known that prison sentence can, rather than reform (or rehabilitate) an offender, actually, as Davies (1993:7) notes:

*...confirm them as criminals, particularly if they acquire new criminal skills from more sophisticated offenders. They [the offenders'] see themselves labelled as criminals and behave accordingly.*

It can also be said that punitiveness is rather in the eye of the beholder, for example whilst imprisonment restricts an offender's liberty, it effectively reduces their responsibility to take care of themselves in the outside world. Such a notion leads Davies (1993:7) to report that offenders' are:

*... not required to face up to what they have done...are less likely to acquire self-discipline [and imprisonment is]... likely to add to the difficulties which offenders find in living a normal and law abiding life.*

However, Thomas (1980:44) cites some occasions when offenders may actually benefit from a period of internment. In this respect he says:

*A sentencer may be confronted with an offender who is thought likely to derive some specific benefit from imprisonment which would not be available under any other form of disposition open to the court; the most typical examples are alcoholics and drug users who have experienced difficulty in overcoming their addiction while at liberty.*

But, if prison sentence is merely to lock away for a time - in effect to forestall an offender's ability to get on with life - can the costs of such a *luxury* be justified? Bearing in mind, on the one hand, the offender's "problems" at being taken out of society, and on the other hand the need to address public protection, the concept of luxury can be justified in Koehler and Lindner's (1992:13) terms in that, "As the correctional population grows, the economic burden becomes increasingly onerous". Prison operating costs are further magnified they say by problems concerning older inmates and females and they indicate that:

*...the annual cost of maintaining a single inmate in a New York City jail in 1981 was [US]\$18,671. By 1990 the cost had reached \$38,697 a year in direct operating expenses. To this figure must be added approximately \$10,000 for fringe benefits for each full-time staff member and, in addition, any debt service for capital construction. The net result is a conservative cost of close to \$140 per day, or over \$50,000 a year per inmate.*

In the United Kingdom the costs situation is just as repressive and likewise South Africa, where Bruyn (1993:279) indicates that in 1992 the average cost of incarcerating one prisoner was "...R45 per day [updated in 1995 to R61.30 per day]", which figure does not include staff salaries, building upkeep or equipment.

On the other hand community-based correctional programmes can provide an intermediate punishment alternative to internment. Such alternatives may include house arrest and electronic monitoring, which sanctions appear to be gaining support around the world. McCarthy & McCarthy (1991:6) suggest that these intermediate programmes are:

*...frequently viewed as cost-effective sanctions [noting that] prison overcrowding is such that any feasible alternative to new prison construction must be considered for its financial benefits.*

Considerations like the ones discussed above have led both the United Kingdom and the United States of America criminal justice systems to actively seek non-custodial punishment for offences wherever possible. But, as noted in previous parts of this work, the general public are unsure of alternative punishment sanctions, often regarding punishment outside of the prison establishment as a *soft option* sentence. In this respect Leone (1993:407) notes that:

*...the role of individuals and the community at large in the application of some types of alternative sanctions... require the voluntary collaboration of the citizen, as well as the favourable attitude of the community.*

Therefore, if the public are to become involved, at least in terms of support, they need reassurance that alternative punishment can achieve a desired aim.

What are the alternatives to a sentence of imprisonment? Do *alternative* punishments provide the potential to reduce overcrowding, reduce crime, be more cost effective, allay public fear and anxiety and, gain public acceptance and support? In an attempt to answer these questions, consideration is now given to three alternative punishment options, viz., the fine, the probation order and, community corrections. These alternative punishment options have been chosen because firstly, they appear in literature to be the most widely utilised alternative punishment options, and secondly they can be argued to be representative of differential punishments. For example, the fine is primarily an individualised sanction, but can in a broad sense be likened to a tariff sentence in that there is usually a principle of proportionality between the offence committed and the amount of fine, and offender income. The probation order is an individualised sanction imposed by the courts and **supervised** by para-legal personnel. However, it is noted later in this chapter that probation is changing its *format*. Probation is now no longer only utilised in relation to the young petty offender. A probation order can, and indeed often does, combine other alternative punishments which Koehler & Lindner (1992:14) suggest has shifted the balance of probation away from supervision alone, to more of a "...control-oriented, law enforcement style..." of punishment. If there has indeed been a shift in the balance of probation criteria (to what is later conceived of as a 'mixed' sentence), then one has to admit a certain regression from the para-legal arena of dispatch, to a more community based level. Finally, community correction, which again falls into the individualised punishment category imposed by the courts, needs good social support structures if it is to succeed. In this respect one notes that more and more the public

are being required to support community based punishment which involve at least their good-will and sometimes their assistance.

## **4.2 ALTERNATIVE TYPES OF SENTENCE**

### **4.2.1 The fine**

According to Brody (1975:6),

*There is one type of sentence, which if it can claim any success, must do so for no reasons connected with treatment or reform. This is the fine, which is not only disagreeable in itself, but has the added advantage of leaving the threat of a potentially more unpleasant penalty for a subsequent offence.*

Brody further indicates that this particular sanction has been "...almost totally ignored by research..." lamenting this situation by suggesting that for certain classes of offender the fine appears to be the most effective measure of all. This "lamentable" situation is endorsed by other authors, for example Van Der Merwe (1991:4-32) who says that the "... success of the fine as a type of punishment is probably because it is not tainted with the (wrong) idea of retribution as revenge...", and Terblanche (1993:231) who argues that "...fines deter people as successfully as other sentences".

The fine is an individualised punishment often utilised by the courts as an alternative to imprisonment and is usually handed down by the court in proportion to the offence committed. The fine appears, more often than not, to be applied to offences which are perceived to be what one may call the less serious crimes. However, the place of the fine in sentencing seems to be changing, from what Van Der Merwe (1991:4-32) suggests is "...the middle ground as far as the scale of aims of punishments is concerned" to a more epicentral position in the scale of penalties. In other words, the fine is now perceived to be a punishment which can, in many cases, be as effective a deterrent as a term of imprisonment when applied and managed correctly. This change is obviously related to the above discussion in terms of the need to keep prison numbers and costs down, but it can also be argued to be relative to what appears to be a new aim in criminal justice circles: to manage crime rather than to control it. For example Feeley & Simon (1992:449) argue that there is a new penology afoot, a penology which is concerned not solely with the punishment of individuals, but with an "...actuarial consideration of aggregates...[a way of] managing aggregates of dangerous groups...", rather than endeavouring to alter the individual criminal in an effort at conformity.

#### **4.2.1.1 An evaluation of the fine**

Whether or not this is actually the case in terms of the fine, there is an either/or debate in progress concerning the success of the fine as an effective punishment. Van Der Merwe and



Terblanche, appear to adopt oppositional positions in this debate, although it is recognised that both authors acknowledge the alternate poles. For example Terblanche (1993:230-1) argues variously that in relation to deterrence "...the fine has done no worse than any other punishment, not even in the case of recidivists." He refutes the argument that a light fine will possibly incite others to commit similar crimes saying that this "...argument is fallacious since sentence is determined in the light of all the circumstances...". Terblanche says that:

*[i]f the amount of fines were always determined by the financial capacity of the offender...it will relate to his income...[and reasons that] the penal value of a fine is not to be found simply by looking at the relevant figure, but by determining how that amount will affect that particular offender.*

On the other hand Van Der Merwe (1991:4-32) indicates that the fine can be seen as a poor deterrent saying:

*A fine seems to serve the aim of individual deterrence only... does not have any incapacitative effect... [and therefore] has problems serving as a denunciatory type of punishment which would serve the ends of retribution.*

He also argues that for various reasons (for example with young offenders) fines have often to be made so low "...that there is virtually no deterrent effect..." whilst higher fines are "...simply paid by someone else than the accused...[and thereby] serves virtually no purpose of punishment, least of all the possible rehabilitation of the...accused".

However, the fine must surely be seen as a cost effective option. Considering the fine in terms of the suggestion made earlier that fines might be seen as veering towards a type of tariff system, whilst taking full cognisance of Terblanche's (1993:232) argument that "[t]he fine can only be an effective sentence if the amount it requires the offender to pay is related to his ability to do so", then this type of punishment must have an effect upon the problems of prison numbers and the economics of crime. Perhaps there is even a case for incorporating the Dutch method of composition alongside the fine? Tak (1992:686) defines composition as a "...transaction... whereby the accused voluntarily pays a sum of money to the public prosecution service... in order to avoid criminal prosecution and a public trial". He further indicates that in the Netherlands, the public prosecutor is entitled to close a criminal case officially on the basis of a composition for crimes which carry a statutory maximum prison sentence of six years. This type of closure may sound foolhardy to the uninitiated, but when one considers that the Netherlands has one of the lowest prison number intakes it does seem to *pay dividends*. For example, in 1988 the Netherlands interned some 46.6 percent of offenders as opposed to say Norway, who in the same year, sanctioned 68 percent with

imprisonment [in, The Sanctions-systems in the member-states of the Council of Europe part II: [1992:673 & 817 respectively]]. Composition as a diversionary tactic does seem to have a dramatic effect upon the problem of prison overcrowding. By way of interest the Netherlands fined some 53 percent of offenders in the same year.

It is noted hereunder that the fine can form part of what is termed later as a mixed sentence. This method of sanctioning utilises a fine, and a further individualised sentence - for example a probation order or a community order - in order to provide what the court perceives to be a sufficiently weighted punishment for a specific offender/offence.

#### **4.2.2 The probation order**

According to the literature a probation order is an individualised method of punishment, more often than not imposed upon a young offender (in most cases under the age of 21 years). The probation order could originally be conceptualised as a form of punishment which was oppositional to the tariff sentence, a conceptualisation which is noted later in this section as somewhat illusory. Notwithstanding, Thomas (1980:12-19) provides the following explanation of what these two sentences (in their pure form) mean in terms of punishment:

*The tariff sentence will usually take the form of a fixed term of imprisonment or a fine, while certain kinds of sentence or order - probation, hospital order, life imprisonment - are invariably used as individualised measures not subject to tariff principles.... a tariff sentence will be imposed when the sentencer wishes to emphasise to the public the gravity of the offence, while an individualised measure will be chosen where the object is to influence the future behaviour of the offender.... four types of offenders are normally considered particularly suitable for individualised measures. These are young offenders...offenders in need of psychiatric treatment, recidivists who appear to have reached a critical point in their life and persistent recidivists who are in danger of becoming completely institutionalised as a result of repeated sentences of imprisonment.*

The probation order is often linked to other forms of individualised sentence, for example a community order, a fine or some form of training (e.g borstal training), the period of which is decided by the courts at time of hearing. Primarily probation is about supervision, it involves a period of time during which the offender is helped to re-adjust to the social demands of society. In attempting this re-adjustment an offence is both admitted and sentenced. However, according to Van Der Merwe (1991:4-59) there can be variations on this theme. For example Van Der Merwe cites a variation in the United States as 'probation without verdict', indicating that "...not only the sentencing, but also the formal conviction, is held back upon

certain conditions". Using the case of a drunken driver who killed someone in a car accident, Van Der Merwe notes that the offender had to comply with "strict conditions which left him very little free time". At the same time the offender was required to:

*...work 50 hours per week, maintain his family, obtain a qualification, attend two sessions of Alcoholics Anonymous per week and do eight hours of voluntary work at a hospital per week. Provided that these conditions [were] kept the accused maintains a clean record, because there is no previous conviction and thus no criminal record.*

Such innovation in the probation order can perhaps be likened to the aforementioned Dutch composition. Both practices smack of enlightened thought. Both composition and probation without verdict allow an offender a second chance to correct his behaviour without blemish and this reason alone must surely be rehabilitating to certain offenders. (Composition and probation without verdict are considered further in Chapter 7 to follow.)

To return to the earlier discussion, Koehler & Lindner (1992:14) confirm the change in probationary influence by saying that:

*Probation was first conceived of, and continues in the public perception, as a service for non-violent, minor, first-time offenders". In this respect they note that "...[d]uring the first half century... the probation population basically consisted of misdemeanants.*

But this situation has changed. Koehler & Lindner say that:

*As early at 1985... over one-third of the ...adult probation population [consisted] of persons convicted in superior courts of felonies (as opposed to misdemeanours), resulting in the emergence of a new term in criminal justice circles: felony probation.*

The authors intimate that the increase in probationary numbers is representative of a new trend, indicating that:

*Thirty-two percent of those convicted of violent felonies (murder or non-negligent manslaughter, rape, robbery, or aggravated assault), in the United States during 1986 were placed on probation, compared to 57 percent of non-violent felons. [However], as a result of the new probationer population, there is concern as to whether public safety may be unacceptably threatened.*

This aspect is considered further later in the thesis.

The changes occurring in probationary orders can be linked to various sentencing purposes, which according to the authors, "...reflect an increased use of 'mixed' sentences in which punishment and community protection now take precedence over rehabilitation...". What this means in effect, is that the low-risk offender, for whom probation was originally conceived, suffer a diminished service as resources are more and more channelled into high-risk offenders, bolstered by the mixed probationary sentence which can, and now often does, include such sentence options as a split sentence (part prison term and part probationary period), or a probationary period which affords some method of victim restitution. In the United Kingdom there is a community offender scheme operational in Essex which works with the assistance of the probation office to allow offenders to make restitution to victims for their errors. For example, a young offender who has broken into an elderly person's home and in so doing caused damage to doors and paintwork, will be given the opportunity of working community hours at making good the damage caused. This provides a link between offender and victim which at least affords each the opportunity to know more of the other, makes good the damage caused, teaches the offender responsibility concerning personal actions (and possibly some skills), and is cost-effective. Time is not wasted (or taken away) as it is with detention and some good can be said to emanate from an initial bad deed. Mixed sentences can also involve the use of fines and other variations of community service.

#### **4.2.2.1 An evaluation of probation**

In terms of the success criteria it can be argued that the probation order does indeed prove successful at keeping prison numbers down and it does in many instances avoid the inherent problems related to a period of incarceration which can confirm, rather than negate, a criminal mentality. In this respect a probation order allows an offender to keep ties with family and society, and effectively avoids the problems involved with 're-integration' once the punishment period is passed. However as one notes from the above changes in probation usage, there are failure elements to be considered. And, furthermore, as probation programmes evolve and increase to cope with the changes in criminal justice criteria, so the need for secure social structures is heightened, which situation was earlier suggested as problematic in the case of South Africa. This is an important point when one notes that Thomas (1980:17) says that "...individualised measures are not chosen in terms of the nature of the offence, but rather in relation to the characteristics of an offender" - the sentence is matched to the offender rather than to the seriousness of the offence. Without strong social support and backing, such a sentence may effectively prove un-workable - individualised characteristics resulting in individualised programmes/sanctions, requires individualised support. Also, the mixed probation sentence is not easily accomplished without governmental funding. For example,

the young offender who damages an elderly person's home and is prepared to "work" his sentence to make good the damage, will at least need materials to be provided (perhaps wood and paint), and will probably also need the guidance of a skilled decorator/carpenter to accomplish the repair satisfactorily.

There is also the very real problem of what Koehler & Lindner (1992:13) term 'the crowding of probation'. In this respect the authors' note that:

*Although the crowding of correctional institutions is well known to the public, few are fully aware of a similar phenomenon occurring in probation agencies.... It is well accepted...that prison crowding has resulted in unprecedented increases in the probation population.... In fact, prison crowding has had a 'hydraulic effect' on probation.... When pressure is alleviated in one point of the correctional system, it is increased at another.*

The effects of this crowding are highlighted by Koehler & Lindner with a look at the probation figures:

*During 1990 the number of adults on probation [or on parole] increased by 5.9 percent over the previous year and reached record levels; five [U.S.] states report that their probation populations increased by more than 16 percent. By 1990 there were 2,670,234 adult offenders on probation...(1992:13-14).*

According to much of the sentencing literature, (see for example, Tak 1993, Thomas 1980) the probation order (and sometimes the fine) are becoming merged with the next type of sentence considered herein, that of community corrections.

#### **4.2.3 Community corrections**

Bruyn (1993:279) says that "Community-based sentencing options represent the modern day solution of dealing with offenders who do not pose a threat to the community". In South Africa, as in many other countries, the policing of community-based sanction falls under The Department of Correctional Services. The sanction options, under the broad umbrella of community corrections, are both diverse and plentiful, and according to some authors, ambiguous. This situation is confirmed by Duffee & McGarrell (1990:1) who say that "The term 'community corrections' would seem to imply that there is another form of criminal punishment that is not community corrections". The authors argue that the term is ambiguous in that all sanctions, even the prison option, can be seen as correction within the community because any punishment is paid for, in the final analysis, by the community. However, the

authors claim that the primary difference to community correction is of course that the offender is punished within the community, and they suggest in this respect that:

*Most proponents of community correction declare that one particular advantage of such programs is the involvement 'of the community.*

Here again though there are problems in definition. For example Duffee & McGarrell (1990) say that the claim that the community is involved in community corrections often, on closer inspection, turns out to be an urgent plea for communities to be supportive of probation, parole, work release, halfway houses and the like, when apparently they are not.

The authors distinguish between three predominant community correction variations, viz., community-run corrections, community-placed correction and community-based correction, and here is noted the diversity, innovativeness and **change** inherent in modern sentencing. One has to admit that, in Duffee & McGarrell's words, "...community corrections is a fuzzy concept" (1990:3) - perhaps sentencing *per se* is, as a result of these changes, also becoming fuzzy? Notwithstanding, the authors' distinction between types of community correction programmes are, as noted below, illuminating!

#### **4.2.3.1 The community-run correction programme**

The community-run correction is, as the term suggests, controlled by the people in the community where the offence was committed. Duffee & McGarrell (1990:30) indicate that:

*The judgement is local and the disposition is locally administered, with reliance on local resources...action is [legally] taken [not on behalf of the victim, but] ...on behalf of the formal community norms that have been violated....The principal emphasis...[can be] retribution, or the exacting of a physical or monetary (as well as social) payment for the commission of a wrongdoing.*

This type of community correction is concerned with punishment rather than future behaviour and according to Van Buren (in Duffee & McGarrell [1990:31]) results in:

*...relatively unclogged courts, many guilty pleas without apparent negotiation, and relatively light sentences, with an emphasis on the use of fines.*

The major constraint to such programmes is identified by Duffee & McGarrell (1990) as limited local resources.

#### **4.2.3.2 The community-placed correction programme**

Here the emphasis is upon a correctional strategy which is policy formulated and resourced outside of the community and supervised within it. Examples of community-placed correction include federal probation, which the authors note uses community resources such as shelter, education and employment, state administered probation and/or parole, and what they term "placement". It might be argued here that community-placed correction embraces the benefits of what is referred to in Chapter 1 as "an acceptance that crime is a social problem" which requires a shared responsibility between all members of society. Furthermore, community-placed correction can be seen to address the justification for public involvement in punishment regimes in terms of what Chapter 1 suggests is the worth of "[bringing] victim and offender together in a joint effort at restitution". Such sentences at one and the same time allow the public to take part and afford a heightened opportunity for reintegration of an offender into society (see Chapter 1, section 1.1 [p.5]).

However, there are several difficulties involved with this type of programme, one of which is the risk factor to the community at large. Another problem is that because funding for the programme comes from outside the community, the community does not have over much influence upon the programme itself. This can cause conflict between the community and the central organising body in respect of community resources. Duffee & McGarrell (1990:34) argue that community-placed correction programmes tend, unlike the community-run programme, to favour the individual. These programmes employ professionally trained staff, paid for by central funding, and emphasis is placed upon reduction in future crime by addressing the needs, conditions or objectives of the individual offender rather than focusing on the social order of a particular community.

#### **4.2.3.3 The community-based correction programme**

Of this programme Duffee & McGarrell (1990:34) have this to say:

*Our last type of community corrections is perhaps the most complex and therefore the one for which ideal examples are most difficult to find. Community-based corrections...refers to correctional programs which exist in a mixed community interactional field: relatively strong extra-local linkages and relatively strong local linkages for policymaking and resource generation...over time these mixed fields may shift towards community-run or community-placed fields.*

Basically the authors admit to difficulty in clarifying this correction programme saying that "...simple definitions are becoming increasingly more difficult to sustain" (1990:2). They relate this difficulty to the changes in community corrections - what they say is a blurring of what

was once the clear line between community and non-community corrections. In this respect they argue, for example:

*What is parole, if there is frequent use of detention in the parole supervision process? Is the parolee in a community corrections program when on the streets and in an institutional program when detained, even if parole supervision continues? Is a jail sentence a non-community sentence if a portion of the jail time is served on work release? Is a probation term still a community sentence when the first six months of probation are to be served in jail? If there is a prison without walls in which all prisoners work in the city by day and return only to sleep at night; and nearby, there is a half-way house for drug addicts in which none of the clients leave the premises for the first six months of their residency, which of these facilities is a community corrections effort?*

This is the crux of the critical point to sentencing suggested earlier by Parker et al. (1989). The changes in sentencing practice and in prison policy, have tended to provide sentencers with a multi-faceted mosaic of options which rather than fit into a particular punishment ideology, are actually tailored to suit the individual offender, what Brody (1975:3) suggests is the judge's difficult task of "...[matching] a sentence to an offender" rather than fitting a sentence to the crime.

#### **4.2.3.3.1 Correctional/community supervision in South Africa**

In South Africa the situation concerning community/correctional supervision is also changing to accommodate what Bruyn (1995:1) terms the correctional services strategic plan to "...become an excellent correctional service". Bruyn (1995:1) says that:

*...in order to control the excessively high prison population in South Africa, less dangerous offenders must serve their sentences in the community. The Department fully supports this view and... [is continuing] to extend the capacity for correctional supervision...by means of the establishment of... additional...community corrections offices countrywide, and the extension of the number of posts for personnel....*

The Correctional Services Department forms an integral part of the criminal justice system in South Africa and in line with international practice, provides for the sentence of correctional supervision as a sentence in its own right. In this respect offenders can serve their total sentence within the community or, can be placed on parole prior to the expiry of their prison



sentence, in order to serve the remainder of their sentence under supervision in the community.

As with other criminal jurisdictions, community corrections in South Africa involve a great number of volunteers from the community, and institutions and individuals are encouraged to contribute with regard to supervision, control and guidance of offenders. To aid effective supervision, South Africa, like many other countries, is currently investigating the introduction of electronic and telephonic monitoring and this should help with supervision over long distances and in remote areas where community corrections offices are not yet operational. And, South African courts are also experimenting with the "mixed" sentence options discussed earlier.

As in other parts of the world, probationers and parolees sentenced in South Africa to correctional supervision, perform free community service within community service institutions, for example hospitals, schools, government departments and welfare organisations. Under the auspices of community corrections officers, who are responsible for the safety and security of the community at the local level, probationers and parolees undertake community hours (some 13 902 hours, performed by 10 641 probationers during 1995 [in Bruyn 1995:8]), which not only provide a form of reparation, but also provide the opportunity to become rehabilitated. On a national level, community security is promoted in co-operation with inter alia, the Department of Justice, Social Welfare and the South African Police (1995:8).

According to Van Der Merwe (1996:4-66,7) punishment in the form of community correction in South Africa is "...bound up with the work of the Krugel committee for the reduction of the overcrowding of prisons", although he proffers the opinion that correctional supervision was not intended to lower prison numbers saying that such *pluses* are "simply desirable corollaries of a type of punishment which can stand on its own merits".

In practical terms, s 6(1)(c) of the Criminal Procedure Act lays down that before an offender can be "diverted" to a sentence of correctional supervision, probationary or correctional officer's reports on the accused must be consulted and the offender has to admit guilt and give consent to both the procedure and the period of supervision. Various other options are available within South African legislation in connection with correctional supervision. For example that s 276A(1)(i) of the Criminal Procedure Act allows the Commissioner to convert imprisonment imposed as the alternative to a fine into correctional supervision, (Terblanche 1996, in Van Der Merwe 1996:4-68), and s 297(1)(a)(i)(ccA) of the Criminal Procedure Act, which according to Terblanche (1996) (in Van Der Merwe 1996:4-68) provides for a suspended sentence to take up the condition that an accused submit himself to correctional supervision.

Failure to comply with a sentence of correctional supervision is covered by s 276A (3) of the Criminal Procedure Act, which Act refers an offender back to court for reconsideration of sentence and which Van Der Merwe (1991:4-68) indicates, "...basically boils down to a return to whatever procedure the correctional supervision has been an alternative to".

Whilst authors like Van Der Merwe (1996) and Terblanche (1996) appear to have reservations about the success of community supervision, primarily due to what one may term *operational difficulties* (bearing in mind Jonker's [1993:307] concerns on the lack of support structures in S.A. [see Chapter 1, section 1.1,p.4]), others on the other hand, for example Naude (1991) (*in* Van Der Merwe 1996:4-68), show optimism in relation to this sentencing option, especially in its ability to bring South Africa in line with what Naude terms "...international standards and community perceptions...". For this and other reasons, South Africa's particular problems in relation to the operational difficulties of correctional supervision must continue to be faced head on if Bruyn's (1995:1) vision of "an excellent correctional service" is to come to fruition.

#### **4.2.3.4 An evaluation of community correction programmes**

Several issues come to mind concerning this debate, not least of which is the public's so called perception that community correction must mean less punishment than a prison term. It is, however, apparent from the above discussion of the debate on community corrections undertaken by Duffee and McGarrell (1990), that community correction is not actually (or, does not have to be) the "soft punishment" some may think it is. Changes in the options and 'mixtures' of community correction sanctions provide greater diversity because they are adaptable and flexible, they can change relationships between offender and victim when community members become involved, they do not have the disadvantages of institutionalised correction, and they can have considerable sanction value relative to the ideological (restitution/retribution) aims of punishment.

The costs of such programmes are another debatable issue. Whilst there appears to be a perception that community correction is a cost effective sanction, which McCarthy & McCarthy (1991:6) say "...is a feasible alternative to new prison construction [which] must be considered for its financial benefits", they also note that:

*...many programs originally valued for their reintegrative potential for less serious offenders are now being reassessed in terms of the economic benefits that can be achieved when prison-bound offenders are accepted into the programs.*

In this respect there is concern that intermediate punishments will cost more than current practice as overcrowding takes place within the various programmes. Added to this there is

the cost of new innovative measures to *police* such programmes, for example electronic tagging. Whilst the innovations within community corrections advance, so do the economics of keeping abreast of them. Keeping abreast is no more keenly felt than within the public sector where public perceptions of sentencing are clouded to say the least. This point is brought home in Terblanche's (1993:231) words when he notes that, " People do not know which kinds of punishment are imposed for different crimes in our country [S.A.]". This situation is further backed by various research into public perception of sentencing, for example, Riley & Rose (1980:345) who say that "...corrections is the part of the criminal justice system that the public knows least about". Likewise the notion put forward by Fagan (1981:403) that "...most people...rely upon the criminal justice system for dealing with crime..." adds credence to the belief that the general populace have little interest or knowledge in sentencing practice. This may be true, but when asked, the public do indeed have an opinion on what types of sentence should be brought to bear for which types of offence, and often that opinion makes one reconsider the assumptions made on the nature of "public opinion" with regard to the sentencing of offenders.

Now one needs to identify what types of punishment are favoured by the public. To achieve this the chapter moves on to take a closer look at the British Crime Survey and the U.S.A National Survey of Crime Severity. It is noted that the public are shown (in opposition to a so-called perceived dislike), to favour alternative punishment for certain offences. The discussion is directed to enable correlative interpretations with the South African research findings reported in the chapters to follow.

However, before moving into a discussion of public choice of sentence, it is pertinent to look briefly at two further types of punishment, namely, the death penalty and whipping (cuts). These two types of punishment are of import to this work on two counts. Both the death penalty and whipping formed part of the sentencing statute operational in South Africa (see Article 276 of the Criminal Procedure Act, Act 51 of 1977) during the research procedure. Therefore, respondents were asked to consider both punishments in their choice of sanctioning the crimes offered within the questionnaire survey. Also, particularly in the case of the death penalty (declared unconstitutional by the Constitutional Court on 6 June 1995, ref: *S v Makwanyana and another* 1995 (2) SACR 1 (CC), and later abolished by certification of the New Constitution on 5 December 1996 [see endnote 1 and Annexure "E"]), an emotive debate continues to surround the subject to such an extent that no discussion of types of punishment would be complete without a brief look at the arguments for and against.

#### **4.2.4 The death penalty**

The death penalty was one of the sentence options offered to respondents in the research module (questionnaire) of this work (see Annexure "A"[p.10] and Annexure "E"). It is noted

later, in Chapters 5 and 6, that respondents chose the sentence of death for the most serious crimes. For example the crime of murder ranks third on the seriousness ranking table and overall, 56 percent of respondents selected the death penalty for this crime. Likewise, rape, which interestingly was seen to be the most serious of all the crimes offered in the survey - ranking first on the seriousness ranking table - records 25 percent of respondents calling for the death penalty.

As indicated earlier the death sentence in South Africa was declared to be unconstitutional on the 6th June 1995 by the Constitutional Court. Prior to this, in February 1990, the then State President FW de Klerk, declared a moratorium on all judicial executions. This decision was taken up by the Interim Constitution (in terms of The Criminal Law Amendment Act 107 of 1990: to stand for 5 years). Cowling (1993:176) informs that South African courts *finding* under the moratorium were "...still obliged to impose the death penalty in appropriate cases in accordance with the new amendments..." but that the courts did so in full knowledge that the penalty would not be carried out. In this respect Cowling notes that the death sentence became entirely discretionary because the courts for the first time were bound to subjectively (section 277 of the Act overturned the previous Act 51 of 1977 by applying the word "shall", i.e. "...sentence of death shall be imposed...only where the court is satisfied that that sentence is the proper sentence" (1993:178)) decide (rather than mandatorily apply) if the death sentence amounted to a "proper sentence" for certain crimes. Cowling (1993:177) indicates that the "...presence or absence of mitigating or aggravating factors..." had to be given consideration in terms of whether or not they provided "...extenuating circumstances..." which affected the crime. In this way findings "...obviously [tended] to result in greater inconsistency" (1993:178).

According to Van Der Merwe (1996:4-4), "...the constitutionality of the death penalty would have to be resolved by the newly constituted constitutional court. This happened in the case that came to be known as *S v Makwanyana and another* (1995 (2) SACR 1 (CC))".

The Makwanyana case came before Justice Labuschagne in the Rand Supreme Court and resulted in Makwanyane and Mchunu being convicted on four counts of murder, one of attempted murder and one of attempted robbery. Four death sentences were imposed on each of the accused. During the period of appeal, the new Constitution came into effect and the question of whether or not the death penalty was still constitutional came under review. No fewer than twelve judgements were sought on the constitutionality of the death penalty from amongst others: President Chaskalson, Justice Ackerman, Justice Kriegler and Justice Mahomed.

A prior judgement of the Constitutional Court, (*S v Zuma* (1995 (2) S.A. 642 (CC) (1) SACR 568)), which Van Der Merwe (1996:4-5) says "...enables the court to give a fairly broad

interpretation to the fundamental rights set out in Chapter 3 of the Constitution, since these rights are still liable to limitation by s33 of the same Constitution", was identified as the approach which was to be followed. This prior judgement followed a "two-stage" approach. In "stage-one" there appear to be two poles of judgement: (1) that the death penalty is cruel, inhuman, and degrading, that it infringes the right to life - an infringement dis-allowed within the Constitution under s 9, and is arbitrarily enforced; and (2), oppositionally, that the death penalty is a legitimate form of punishment.

The onus was placed upon the accused to prove that the death penalty *prima facie* infringed upon their fundamental rights - (1) above - and this Van Der Merwe (1996:4-5) says the accused managed to discharge. The Attorney-General then had to prove that the circumstances of the case necessitated such an infringement - (2) above -. This Van Der Merwe (1996:4-5) says he failed to do. It is not possible to cover the entire debate here (see Van Der Merwe's comprehensive account in Sentencing (1993) chapter 4 (1996)). However, a short discussion of the main tenets of the judgement debate which took place appears in Annexure "E".

Finally, as a point of interest, Naude's (1991:316-322) research into prisoners under sentence of death in South Africa during April 1991 (14 months after imposition of the moratorium and 10 months after promulgation of The Criminal Law Amendment Act which did away with the mandatory death sentence for murder), showed a universum of 320 prisoners awaiting the death sentence in South African Prisons. Statistics show that of these 320 offenders, most were male 315 (98.4%), most were Black 258 (80.6%), (75.9%) were under the age of 32 years, and 228 (71.3%) had previous convictions. As a further point of interest, Naude correlates a number of similarities between death row prisoners in S.A. and death row prisoners in other parts. For example, in the United States Naude indicates that research shows that American death row prisoners are 99 percent male, 40.1 percent Black (from a population of only 12% Black) and 69 percent have previous criminal convictions. Naude says that there also seems to be a link between low socio-economic status and murder and previous criminal convictions (apparent both in the South African research and the United States research) and, furthermore, she indicates that such similarities can be found in other research, for example the Mushanga study in Uganda.

#### **4.2.4.1 An evaluation of the death penalty**

Bearing the ongoing debate concerning the death penalty in South Africa (of necessity briefly detailed above) in mind, what are the academic arguments for and against the death penalty? To begin with, it is difficult to talk in terms of success and failure when addressing the death penalty. Such an abhorrent punishment raises many questions in the area of basic morality and human rights issues. However, as with virtually all debates, two divergent poles exist.

Notwithstanding, the polemics of the debate on the death penalty are firmly located in an emotive arena. Whilst not wishing to delve too deeply into the argument for and against this type of punishment, it is necessary to briefly visit relevant literature in order to denote the main arguments within the two divergent poles of thought.

According to Van Der Merwe (1991:4-18), and other prominent authors in the field, the 'retentionists' argue that the majority of people are in favour of retention of the death penalty, (which view is corroborated by the South African survey detailed later in this work). In respect of support for the death penalty he notes that:

*....surveys show that support for the death penalty has remained high both within South Africa and overseas.... [Where], [A]s far as the latter is concerned [and] despite the arguments against...support in the Western countries for its retention or reinstatement remains high or has increased" (1991:4-18).*

He goes on to suggest that retentionists believe there is no real alternative. This form of argument, he says, revolves around the concept of permanent incapacitation and deterrence. Whilst Van Der Merwe admits that for "extreme" cases of murder, for example prison murders, "...there is simply no alternative to the death penalty as a means of incapacitation and a resulting protection of the murderer's fellow prisoners", he appears to support the oppositional argument that it is impossible to prove whether such sentence provides much in the way of deterrence per se. Rather, he relocates the retentionist lobby within the arena of moral retribution.

Noting that it is in the area of retribution that the "debate really becomes emotional", Van Der Merwe offers various ideas relative to the fundamental moral character of law, for example that:

*.... the criminal law [is] moral in character and that punishment is a reproach by the presiding officer on behalf of the community.*

Further, he says that an execution is the ultimate manifestation of a community's belief in the authority of the criminal law and its prescriptions. He argues that retentionists believe that if this ultimate moral retributive conviction is lost from the criminal law, the very sense of wrong itself may also disappear, paving the way for a situation whereby the people might take the law into their own hands (1991:4-20). In conclusion of the retentionist argument Van Der Merwe notes that " ...the (compulsory) death penalty is demanded by the Bible..." (1991:4-21). Again there exist two schools of thought: one for and one against the death penalty in relation to the Bible text. It seems preferable here merely to note Van Der Merwe's recognition that

"...practising Christians, differ on the question of capital punishment, probably because of differing interpretations of the Bible" (1991:4:22). This recognition reiterates the researcher's earlier argument that meaningfulness is a concept which has to be defined in relation to one's particular differing interpretations (see Chapter 1, section 3 [p.10]), and that this divergency concerning Bible teachings affects one's beliefs in relation to the debate for or against imposition of the death penalty.

The abolitionist argument is, the writer would suggest, more charged with emotion than the argument of the retentionist. Van Der Merwe suggests that primarily the abolitionist's "...strongest arguments against the death penalty are the possibility of judicial error and the view that this type of punishment does not serve any useful purpose" (1991:4-7). He discusses the debate under headings like, judicial error, cruelty (primitive/inhumane), infringement of human rights, arbitrariness (misused for non-legal ends) and the phasing out of the death penalty overseas, backing his discussion firmly in the area of one's particular position on the aims of punishment. However, as convincing as such an argument may appear to the abolitionist, Naude notes that "The death penalty is still widely practised in many countries despite the United Nations advocating its abolition since 1957", qualifying this position with the statement that "... the death penalty is in force in 101 countries [and is] retained in a further 18 for exceptional crimes". Naude (1993:312) further informs that:

*In the United States of America the death penalty was ruled unconstitutional by the Supreme Court in 1972...but in 1985...was again declared constitutional and, by 1989, 37 of the 50 states had reinstated the death penalty.*

One aspect of the death penalty debate which might be located within the abolitionist camp - not widely debated and yet of much interest to the argument within this work -, is the economics (costs) of the death sentence as opposed to the alternative of life imprisonment. In this respect retentionists appear to suggest that it is more cost effective to execute the death sentence upon an offender than to finance long sentences of incarceration. However, Keve (1992:12) provides a convincing oppositional argument. He questions:

*[W]ouldn't it be much cheaper to sentence him [the offender] to death and save all ...imprisonment cost[s]? Not so. The dollar argument leads quite the other way" (1992:12).*

Having told the reader that the cost of keeping one person in prison in Virginia is calculated at a current average of about \$17,000 per year, he provides a solid argument to show that to put to death is actually far more expensive than incarceration, even for many years.

#### 4.2.4.2 The economics of the death penalty versus life

Keve suggests that the cost of running a prison are to all intents and purposes fixed. Once the prison exists, its operation is not affected by what he terms:

*...minor variations in its prisoner population...[noting that] we [therefore] do not save money by taking one prisoner out...to execute him...[S]o an execution cannot truly be shown to save any imprisonment cost...even when compared with a life sentence...[saying], [b]ut the cost of executing - now that's another matter (1992:12).*

Keve's argument is that the more severe the punishment the more costly the prosecution and he gives an indication of the protracted principles governing the imposition of the death penalty. He notes that hearings are obliged to give due consideration to mitigating and aggravating factors which include features of the defendant's life, character and conditions of the crime, and that sentence must be followed by the automatic right of appeal to the highest state court.

For example he discusses the overwhelming complexities which now characterise legal procedure in capital cases, noting that defendants are almost always indigent and normally require the services of defence counsel, at state expense. Further, that jury selection takes 5.3 times longer than jury selection in other cases, and 5.3 times longer at trial. He notes that defendant life histories are very expensive to obtain and that whilst all these processes are taking place, the defendant is kept on death row where the operating costs far outweighs the cost of housing a prisoner in other prison units. Quoting various research findings into the cost of implementing the death penalty Keve indicates that "Florida... is paying the highest level...with a calculated cost of each execution figured at \$3,178,000 (1992:13). Therefore, he successfully argues that even a life sentence of 40 years is cheaper for state financing than an execution. Even allowing for the fact that jury selection does not apply to South Africa, Keve's argument provides a very plausible string to the abolitionist's bow!

Finally, Keve addresses the "merits" of imposition of the death penalty and adds credence to the abolitionists' belief that this sentence has no deterrent effect. He says:

*It is the unique deterrent value capital punishment is presumed to have that provides the mainstay of the arguments for retention of the death penalty. That this is true has been refuted year after year...by statistical experts, police officials from abolition states, psychiatrists, and criminologists among others (1992:13).*



Considering Keve's argument concerning the economics of the death penalty and the debate engendered by the abolitionist lobby as a whole, there appears to be little worth in continuing to entertain the possibility of judicial error. When one adds the concept of irreversibility to the debate one perhaps has to admit that Keve's last comments deserve further thought. He says, "In the final analysis, my own opposition to the death penalty is not based so much on its excessive cost, or even its failure to deter crime, but is simply found in these three successive points":

- (1) The act of murder reveals a lack of respect for human life.
- (2) In consequence then, we need to encourage a higher respect for life. But finally,
- (3) it defies all logic to suppose that we can encourage a greater respect for human life by the device of taking human life (1992:14).

It might be suggested, however, that such "further thought" be placed alongside Van Der Merwe's concerns that "...the whole moral character of the criminal law would be watered down if there is no longer an ultima ratio for the very worst cases" (1991:4-24), whilst not losing sight of the fact that the murder victim has also, to utilise Keve's point (1) oppositionally, been subjected to "a lack of respect for human life" reiterating and reaffirming the concerns made earlier in this section.

#### **4.2.5 Corporal Punishment: whipping (cuts)**

Corporal punishment (whipping[cuts]), as with the punishment of the death penalty, formed part of the sentence options offered to respondents within the research module of this work because it was a punishment option provided by South African Statute at the time of the research survey (see endnote 1). In some parts of the world, for example Saudi Arabia, whipping is administered - along with other more physically violent abuse [e.g. stoning or the severing of limbs] in public, whilst in South Africa whipping was usually reserved for the young offender and was administered in private. The South African Criminal Procedure Act (at the time of the research) contained a proviso for both adult and juvenile whipping, and although Van Der Merwe (1996:4-28) says that adult whipping had fallen into disfavour in South Africa, questionnaire respondents within the research module of the study were asked to consider the punishment of whipping (cuts) in general terms, i.e. for both the young and adult offender. It is noted later in chapter 6, that whipping was indeed considered by questionnaire respondents to be a "disfavoured" form of punishment: very few respondents chose this punishment option. However, before looking briefly at the debate which surrounded the punishment of whipping at the time, it is perhaps pertinent to momentarily consider this form of punishment in the light of the then Constitution.

In this respect, Van Der Merwe (1996:4-25) indicates that of the five types of whipping which were of relevance to sentencing decisions prior to the new Constitutional Court ruling, namely adult, juvenile, prison, school and home, "...[t]he Constitutional Court did away with the first two", (the two which concern us here). The Constitutional court declared adult whipping unconstitutional in the case *S v Williams* (1995 (2) SACR 251 (CC) with Judge Langa saying that "South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults" (1996:4-28). Again, a short discussion of the judgement debate on whipping appears at the end of the thesis in Annexure "E".

Concerning the *situation* at the time of the research, according to Van Der Merwe the justification for juvenile and adult whipping were different (taken up more fully in the section to follow). The means of administration varied between the juvenile and adult offender and was relative to the age of the person to be whipped and the weight of cane to be used. Van Der Merwe (1991:4-25) says that:

*... the juvenile offender... [had to] be a male under the age of 21 and... [that a] 'light' cane... [was]...utilized... as close as possible to three feet in length and three eights of an inch in diameter. The adult offender...[had to] be between the ages of 21 and 30 and the 'heavier' cane ... utilised... [was to] be as close as possible to four feet long and half an inch in diameter.*

He further notes that special provision was made "...for whipping to be imposed by prison tribunals - which... [had] increased jurisdiction in that a whipping... [could] be imposed upon male offenders up to the age of forty years".

#### **4.2.5.1 An evaluation of corporal punishment: whipping (cuts)**

The so called success of corporal punishment was purported to lie in its ability to provide a form of punishment aimed at keeping the offender out of prison, which condition it was assumed was particularly conducive to the juvenile, more often than not, first-time offender. In the case of a juvenile offender, such a punishment could be argued to forestall the possible indoctrination of criminal influence which might be found inside the prison establishment (the new Constitution refutes both these assumptions). In the case of the adult, the chances that an offender was a "first-timer" who might also benefit from a punishment aimed at forestalling a prison term, were very much diminished. Van Der Merwe notes that the South African Appellate Division [found] that it was undesirable that corporal punishment be coupled to a long term of imprisonment, precisely because the whipping would then not serve the end of keeping the offender out of prison (1991:4-25/26). However, even this decision was somewhat watered down by Justice Steyn (In Van Der Merwe 1991:4-26), when he indicated that adult whipping could serve a purpose, other than an alternative to imprisonment, "...if

there had been an appreciable amount of cruel violence involved in the commission of [a] crime" - a punishment which in this context smacks more of retribution than to the desired aim of prevention through rehabilitation.

In terms of failure, whipping, as a deterrent, - especially in private - could have been argued to fall short of the perceived desired effect: to rehabilitate. Van Der Merwe (1991:4-27) indicated that this form of punishment is probably more in line "with some spirit of retribution or revenge" because the evidence does not seem to indicate that it constitutes an effective individual or general deterrent (this point also addressed by the new Constitution). Failure might also, according to Van Der Merwe, be located in the area of what one could call 'violence which begets violence'. Again, the new Constitution appears to discharge such a proposition. In Judge Langa's words:

*...a juvenile is of [an]... impressionable and sensitive nature...he should be protected from experiences which may cause him to be coarsened and hardened. If the State...treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished. (Para.[47] of the judgement, in Van Der Merwe 1996:4-29).*

Judge Langa is here rightly concerned with the problems inherent in a State punishment which degrades self-esteem, human dignity and the rights of others and this may indeed coarsen and harden a juvenile (debatable in terms of the more hardened and ever more youthful offender of today). On the other hand, the right punishment administered quickly and at the appropriate time may turn weakness and vulnerability into strength and accountability. In this respect Van Der Merwe (1991:4-27) says that if corporal punishment is not abusive and is experienced by a child as being fair, it can reawaken or instil responsibility for actions. Might this not be so with offenders?

### **4.3 THE PUBLICS' CHOICE OF SENTENCE**

#### **4.3.1. Discussion**

In various areas of this work it has been noted that both the United Kingdom and the United States of America conduct fairly regular public crime surveys. Both countries survey their publics' for specific reasons. For example, according to Pease (1984:34) reporting on the British Crime Surveys, it is useful to have "...[the] opportunity to link data on offence seriousness with the scaling of sentence severity", or to gain "...insights into preferred punishments", or to "...get closer to victim perceptions of crime". Whilst Schlesinger (1985:iii) talking about The National Survey of Crime Severity in the United States says:

*...[the crime survey is] an innovative way of looking at crime. It points toward priorities and reaffirms basic values.*

Justification for public involvement within juridical decisions has been motivated for in several areas of this work thus far, which to briefly recap, is justified in terms of every citizen's democratic right to take part in decisions made concerning the crime problem and its addressal. In this respect democracy relates to the notion that all individuals are assured that **their voice is heard**, and to what was noted earlier (chapter 1, section 3 [p.10]), was the moral justification for governments' to secure public consent. This type of democracy was suggested by Hall (1987:129) to be the basis of consent on which the courts rest and, furthermore, was argued to be the primary proviso for universal legitimacy. That the public are more aware and more involved in crime than ever before, can be backed by a brief look at the work of the United Nations Interregional Crime and Justice Research Institute and its various crime surveys.

#### **4.3.1.1. The United Nations Interregional Crime and Justice Research Institute (UNICRI)**

Since 1989, UNICRI has undertaken what it terms "victimisation surveys". Victimisation surveys are a means of finding out about the so called dark figure of crime, in other words, as a way of assessing the total crime picture. Until 1989 the only correlations available to interested parties were the official figures of reported crime. It is widely recognised that official crime statistics record only part of the crime picture, giving no account of the amount of un-reported crime in society, and certainly offering no information on victim involvement.

The first UNICRI survey in 1989 covered some 15 industrialised countries, one Eastern European and one developing country, whilst the second survey in 1992 included 13 developing countries, of which South Africa was one. Industrialised countries taking part in the survey were funded via the Ministry of Justice of the Netherlands (on behalf of UNICRI) in respect of administration and statistical analysis costs, whilst developing countries received overall sponsorship in order to enhance participation. Both the 1989 and the 1992 crime surveys used a standardised questionnaire and involved 1000 respondents in each participating country. Basically, standardised ICS questions worked well in industrialised countries, but provided many problems in developing countries. These problems, in the main, were related to what one might call differentials in material goods. For example, some developing countries had low car ownership and this relegated the questions on vehicle crime to something of a non-representational arena in terms of global correlates. Likewise the theft of bicycles was the highest in The Netherlands (90%), which is not surprising as ownership rates for bicycles in that country are the highest. In relation to other countries taking part in the survey, bicycle ownership and theft are very much lower, or even

non-existent, once again providing a somewhat non-representative global picture (in van Dijk and Mayhew, UNICRI publication No.49, 1993:15).

However, the UNICRI survey does offer some interesting insights into the crime rates in South African. Taking the UNICRI publication No.55 (1995) as a guide, it is noted that:

*During 1991, 1.7 million serious offences were recorded by the police.... [A]pproximately 4,800 offences per day [providing an] overall rate [of] 5,456 offences per 100,000 of the population. Thus, six out of every 100 persons could become victims of crime or offenders each year. During the period 1987 to 1991 violent crimes increased by 10%, murder by 39%, robbery by 35%, rape by 15% and aggravated assault by 2%. (Naude, Grobbelaar, Naser & Pretorius, 1995:417).*

Using the same document, a comparative perspective of Sub-Saharan Africa and other developing countries shows that Sub-Saharan Africa has the highest percentage of respondents victimised by three selected types of crime in one year, viz., over 45% compared with the next highest, North Africa with around 20% (Zvekic et.al., figure 1, 1995:20). This document also attempts a comparison of the crime problem between developing countries and industrialised countries noting that:

*An attempt towards truly global comparison is fraught with many difficulties particularly related to methods of data collection and sampling designs...[and, furthermore, that]...the results should be read with caution (Zvekic et.al., 1995:49).*

Notwithstanding this warning one can, however, say that developing countries have higher victimisation rates overall for selected types of crime whilst industrialised countries present lower rates overall. (Zvekic et.al., 1995:50).

Considering attitudes to punishment, Zvekic et.al., (1995:56) point out that:

*...imprisonment is the most frequently chosen sentence in the developing...countries...[probably because of] the lesser availability of non-custodial options [and their] implementation..., [and notes that] support for imprisonment is higher in crime-ridden societies (Zvekic et.al., 1995:55).*

Interestingly, looking at the work of Naude (1994:110) on South African sentencing concerning the crime of theft, it is seen that she confirms this position as does the study research to follow. Naude indicates that:

*Industrialised countries are more in favour of community service sentences although there appears to be strong support for prison sentences in most English-speaking countries - especially in the USA....*

This chapter now moves on to consider, in a little more detail, the sentencing preferences of the U.K. public contained in Pease's (1988) Research and Planning Unit Paper 44: judgements of crime seriousness: evidence from the 1984 British crime Survey.

#### **4.4 PUNISHMENT PREFERENCES FROM THE 1984 BRITISH CRIME SURVEY**

##### **4.4.1 Discussion**

As noted above from data taken from the UNICRI victimisation survey in the developing world, survey respondents from industrialised countries like the United Kingdom appear to favour the punishment sanction of imprisonment far less than respondents in developing countries like South Africa. In the chapters to follow the researcher will look in detail at the responses of the South African public to seriousness attitudes and punishment preferences for various crimes. In this the final section of chapter 4, respondent scaling of penalties from the 1984 British Crime Survey are considered.

##### **4.4.1.1 The link between seriousness and penalties**

According to Pease (1988:34) "The BCS offers an opportunity to link data on offence seriousness with the scaling of sentence severity". Respondents were asked to rate the seriousness of an offence and then to select an appropriate sentence (this being the practice undertaken by the thesis research to follow). In an attempt to "bridge" respondent judgement of offence seriousness and sentencing preferences, offences were divided into groups which, as far as possible, reflected respondent perceived seriousness. Then the chosen crimes were divided again into personal and property offences, to allow for crimes of an equally serious nature to be judged in terms of the personal/property categories. According to Pease (1988:41) this method showed that there were marked differences in preferred action according to crime type. Respondents tended to act more harshly towards crimes of a personal nature (this pattern is also discernible in the thesis research to follow). Pease says, that respondents tended to choose a prison term for crimes of a higher personal seriousness, and that this was not always the case with property crimes. Interestingly, he notes community service (he says surprisingly), as the most appropriate sentence option for the more serious property crimes. In this respect Pease argues that:

*Generally,...personal crime is responded to in a more extreme way than equally serious property crime. If trivial, it more often justifies no action. If serious, it typically justifies more and longer imprisonment.*

Pease suggests that this can be seen to indicate that when people choose an appropriate sentence for a specific type of crime they do "...more than equate offence seriousness to sentence severity". His reading of what is taking place here is of import to this work and is therefore reproduced hereunder in his words:

*Prison is advocated for the most serious offences, both when committed against oneself and committed against other people. No action and warnings are advocated for intermediate seriousness. Superimposed on this retributive base, however, is the apparent view that different types of offence are most appropriately visited by consequences which differ, even when the offences are matched in rated seriousness. Further, there is a suggestion that victims take a distinctive view of the proper punishment for offences committed against them - one in which, for example, probation is appropriate for offences of some seriousness, but compensation is not.*

Much of what Pease alludes to here is visible within the research undertaken in Pretoria for this study, and is discussed further in the chapters to follow where an attempt is made to correlate some of the BCS findings with those of the Pretoria survey.

#### **4.5 CONCLUSION**

This chapter has considered in some depth the various sentencing options utilised by the courts to punish offenders. It has been noted that sentencing is at a point of change with many sentence options being innovatively mixed in order to suit both the changes in crime patterns and the individual offender. The chapter took into account some of the successes and failures of these new sentencing options and debated the for and againsts in terms of programme support/supervision, and costs. Finally, the chapter considered the UNICRI international crime research and the British Crime Survey in respect of various publics' perception of crime in society, and discussed the publics' reaction to punishment sanctions in terms of their sentence preferences. Where appropriate consideration was given to the area of public support for certain sentencing options.

In the chapters to follow the findings of the South African research are reported. The various research projects discussed in the work thus far are further debated and compared with the thesis research in order to provide, where possible, a correlative analysis in support of the thesis justification for public involvement in the sentencing policy within South Africa.

## ENDNOTE 1

The New Constitution was certified by the Constitutional Court on December 5 1996, wherein Option 1: "Everyone has the right to life" (section 2.4 above), was incorporated. The final Constitution did not say anything directly about the death penalty, but by ratifying the interim Constitution, by implication, it ratified the decision of the Constitutional Court in *S v Makwanyana*, interpreting the interim Constitution. Likewise, the abolition of corporal punishment was certified by the Constitutional Court on December 5 1996 as an unconstitutional sanction.



**CHAPTER 5**  
**THE RESEARCH FINDINGS**

**RESPONDENT FEAR OF VICTIMISATION  
AND SERIOUSNESS SCORES FOR  
SPECIFIC CRIMES**

## **CHAPTER 5**

### **THE RESEARCH FINDINGS**

#### **RESPONDENT FEAR OF VICTIMISATION AND SERIOUSNESS SCORES FOR SPECIFIC CRIMES**

##### **5.1 INTRODUCTION:**

In this chapter the research findings for the first two sections of the questionnaire are discussed. To begin with, a brief overview of respondent demographic characteristics are provided and then the chapter reports on respondent fear of victimisation and finally, respondent seriousness scores for specific crimes.

As noted in chapter 1, the research for this study was conducted in November 1993. At that time South Africa was preparing for the first ever forthcoming democratic elections. Prior to this research (November 1993), South Africa participated in the UNICRI international crime (victim) survey for the first time in 1992 and again subsequently, in the 1995 UNICRI survey. In the report on the second international crime (victim) survey in Johannesburg, Naude et. al. (1996:36 & 37) compare victimisation rates between the 1992 and 1995 UNICRI research surveys, and highlight the dramatic increase in crime within South Africa as a major problem. Naude et.al. note, for example, in the case of vehicle ownership, that car theft increased between the 1992 and 1995 from 17,9 percent to 24,0 percent and theft from a car increased from 33,3 percent to 37,0 percent. This is how Naude et. al. (1996:37) report on the increase of other crimes in the country between 1992 and 1995:

	1992 survey %	1995 survey %
Burglary with entry	12,9	18,1
Attempted burglary	8,5	12,8
Robbery	10,9	10,6
Personal theft	13,4	22,4
Sexual incidents	6,1	43,1
Assault/threat	18,0	17,1

Against the background of change - in both social and penal climates - and the increase of crime in the country, the survey research (and findings) reported herein was conducted. It is to this research that this chapter now turns.

## 5.2 DEMOGRAPHIC PROFILE OF RESPONDENTS

As noted previously, the sample design specified 100 responses from each population group. This design was based on area of residence rather than race per se. Some alternative classification is realised, with 101 being in each of the White and Black groups, 99 in the Coloured group, 96 in the Asian group and 3 not classified. Such alternative classification might be expected within the (then) apartheid system, where personal classification of race may not match national classification within residential area. Note that this in no way reflects the *true* population of Pretoria as Table 5.1 below shows, 1991 census results giving less than 10% of the Pretoria district population as consisting of Coloured and Asian people.

As can be seen, Table 5.1 gives demographic details of the sample population as a whole, and provides a breakdown of respondents taking part in the survey in terms of, race, gender, age, education, home language, occupation, marital status and religious belief.

Analysis showed that overall, the White survey population recorded more or less equal gender rates and were generally young and well educated. Well over three quarters used only the Afrikaans language in the home and around the same proportion were married. All but 3 percent claimed to hold a religious belief.

The Black survey population were of similar gender breakdown to the White group, but appeared overall to be younger. All but 12 percent had above Standard 8 secondary education. This group were, therefore, the most educated group within the survey. Virtually all the Black population used a vernacular language in the home, nearly three quarters were married and most professed to hold a religious belief.

The Coloured survey population showed a biased gender response with significantly less males taking part in the survey. The bulk of Coloured responses fell within the two younger age groups with 49 percent having, at most, Standard 8 education. Both the Afrikaans and English language were used in the home, and Coloureds recorded the highest not-married response. All but 1 percent held a religious belief.

Respondents within the Asian survey population were almost equally divided between male and female and in the main, fell into the two younger age categories. The Asian group also appeared to be better educated than Whites and Coloureds and used mostly the English language in the home. Well over half of the Asian population recorded as married, and as might be expected, were shown to predominantly hold non-Christian religious beliefs.

**TABLE 5.1: COMPOSITION OF SAMPLE: (N) = 400**

CATEGORY	% SAMPLE	TOTAL	1991 POPULATION % PRETORIA <sup>1</sup> tot. = 667 700
<b>RACE</b>			
WHITE	25.4	101	67
BLACK	25.4	101	26.3
COLOURED	24.9	99	3.7
ASIAN	24.2	96	3
missing frequency		3	
<b>GENDER</b>			
MALE	48	193	50.2
FEMALE	52	206	49.8
missing frequency		1	
<b>AGE</b>			
18-35	49	197	
35-49	34	134	
50+	17	69	
<b>EDUCATION</b>			
LESS THAN STD. 9	29	118	
STD. 9-10	34	134	
STD. 10+	37	147	
missing frequency		1	
<b>HOME LANGUAGE</b>			
AFRIKAANS	44	173	
ENGLISH	25	101	
AFRIKAANS & ENGLISH	8	32	
OTHER	23	92	
missing frequency		2	
<b>OCCUPATION<sup>2</sup></b>			
PROFESSIONAL	31	123	
SKILLED	40	161	
SEMI-SKILLED	6	23	
NOT EMPLOYED	23	92	
missing frequency		1	
<b>MARITAL<sup>3</sup></b>			
MARRIED	64	252	
SINGLE	36	142	
missing frequency		6	
<b>RELIGION<sup>4</sup></b>			
CHRISTIAN	74	294	
NON-CHRISTIAN	23	94	
NONE	3	11	
missing frequency		1	

1: only basic sub-group breakdown possible

2: occupation reclassified see section 2.1 above

3: married likened to "joint partnership", of any kind

4: religion reclassified into 3 groups as shown

### 5.2.1 Demographic features

Taking an overall look at the demographic information, the survey sample appears to have been successful on various fronts. For example, the chosen criteria provided for almost equal male and female respondents who fulfilled what might be termed *across spectrum roles* within the chosen households (rather than head of household/breadwinner). The survey also gleaned an across spectrum age distribution with responses recorded on the frequency tables from 18 - 83 years. As previously noted, Black respondents are a younger group compared to the other three groups and record only 6 percent response within the 50+ age category. All in all, most readings agree fairly well with the 1991 National Census information.

The survey population as a whole were well educated. Once again, this response may be a reflection of the chosen methodology whereby "households" are more likely to reflect a "nuclear" family unit which Elliot (1986:4) suggests consists of husband, wife and their children. Furthermore, living in and around Pretoria might provide for more regularity of secure employment and this in turn makes the likelihood of regular schooling and further education for "family" members a distinct possibility. Overall, slightly more females were less educated than males, with this trend particularly highlighted in the Coloured response where the female numbers are highest. Notwithstanding, it should be noted that numbers are small and thus these results should be treated with relative caution

The question on occupation was not successful due to the wide range of possible responses, and anomalies occurred because response options were not mutually exclusive. For example, a clerk could fall into at least three different categories, dependent upon his/her place within the employment market. The seventeen original options were re-coded into four broad groups to provide more meaningful information.

A point of interest concerning occupation was the one respondent who recorded in the professional/executive category with less than standard 9 education, and the two respondents who recorded in the semi-skilled category with more than standard 10 education. Other categories were much as expected with 46 percent of those with less than standard 9 education recording as unemployed. Overall, females recorded less employment, especially in the professional category, and Blacks, as the most educated group, the most. One might speculate that the high rate of Black female employment is also a reflection of cultural norms: more Black women perhaps having to fulfil the role of breadwinner within the family unit by entering into paid employment.

### 5.3.2 Victim of stated crimes

The questionnaire then posed a question on respondent likelihood of becoming a victim of the crime of rape, assault, robbery, housebreaking or theft (see section 4 hereunder), and then utilised these stated crimes to uncover more information of victimisation in the home or the residential area.

Table 5.2 shows that Whites, record being a victim of either rape, assault, robbery, housebreaking or theft in the home (A2.3) more than the other three race groups (43%), whilst Blacks record being a victim of one or more of these crimes in the residential area (A2.4), the most (38%).

Ambiguity of response between the percentages of victims of crimes reported to the police (A2.1), (30%), with victims of a specific crime of rape, assault, robbery, housebreaking or theft, in the home (A2.3), (35%) or in the residential area (A2.4) (27%), may be due to one or more influences. For example, not all crimes are reported to the police and yet a crime did occur. The official reporting of crimes is noted in literature to be consistently limited, and although there is no way of ascertaining public perception concerning the police in the research findings to hand, various reasons can be offered as to why non-reporting occurs. For example, that the survey public view police response to crime as ineffectual or that they fear the police (a real possibility within South Africa). Zvekic et. al. (1995:variously) in UNICRI publication No.55, reporting on British respondents, say that non-reporting of crime is often due to a public perception that the police can do nothing and Naude (1995:421), for similar reasons, indicates that only 33.8 percent of crimes in South Africa are reported.

Likewise, percentage differential may have to do with question wording. In this respect Mayhew & Maung (1992:4), reporting on the 1992 BCS, note that:

*A...[further] possibility is that the findings on reporting are an artefact of the survey method. It is possible that those who have been often victimised will simply forget...incidents. Also, the interview process may result in either interviewers or respondents rationing themselves to a limited number of incidents.*

To continue, it was noted above that Whites claim to have suffered more home incidents and Blacks more residential area crime and various speculative reasons may be offered for this finding. For example that the White group experience more crime in the home because of wealth or that Blacks experience more crime in residential areas because of township overcrowding or the lack of personalised transport which keeps them on the streets longer.

Males recorded higher victimisation rates than females in all categories and likewise, the more educated. Reasons for these results, although also speculative, may be that males are more actively about in society than females, or that they do not take precautions to the extent that females do. It may also be the case that education points to more wealth and again provides a possible correlative link with victimisation. In terms of the older respondents, it is not difficult to offer reasons for their enhanced vulnerability in crime situations at home. Seen in this way, explanations of victimisation could be argued to follow a perceived "common sense" route, i.e., that the socio-economic variants of more education, being White (and wealthy) being male, or just living longer, provide an enhanced chance in the victimisation stakes. Notwithstanding speculation, the recorded responses can be said to show that crime victims have experienced more crime than they have officially reported to the police.

Table 5.3 indicates combined overall group percentages of respondents classifying as home or residential area victims of a stated crime. As before, Whites males and the most educated, show higher rates of victimisation.

**TABLE 5.3: VICTIM % WITHIN EACH GROUP OF RAPE, ASSAULT, ROBBERY, HOUSEBREAKING OR THEFT, IN HOME, OR RESIDENTIAL AREA.**

CATEGORY	% GROUP	
	%	No.
<b>RACE</b>		
WHITE	51	51
BLACK	43	43
COLOURED	40	40
ASIAN	44	42
<b>GENDER</b>		
MALE	50	97
FEMALE	39	80
<b>AGE</b>		
LESS THAN 35	43	84
35-49	46	61
50+	48	33
<b>EDUCATION</b>		
LESS THAN STD. 9	36	42
STD. 9-10	46	61
STD. 10+	50	74

#### **5.4 LIKELIHOOD OF BECOMING A VICTIM OF CRIME**

Section A2 of the questionnaire asked respondents to answer questions on their perceived likelihood of becoming a victim of one of the stated crimes of rape, assault, robbery, housebreaking or theft. It is suggested that likelihood of becoming a victim can be equated to fear, and hence to perceptions of seriousness. Before moving on, it is of interest to note that Wolfgang et.al. (1985:vi), discussing severity of specific crimes in The National Survey of

Crime Severity in the United States, indicates that "...differences appear...when the scores of different groups are examined". For example, "Blacks and members of other racial groups in general, assign lower scores than Whites. Older people found thefts... to be more serious than people in younger age brackets. Men and women... did not differ in any significant way...". Many of these indicators are present in the discussion to follow. For example, it is seen that Whites do indeed score higher than other race groups for certain types of crime, although Wolfgang's report on age and gender are at variance with the South African findings herein.

As a second point of interest Naude et.al's (1996:38) research shows that the fear of crime in South Africa is worsening as perceptions of the amount of crime and crime seriousness increase within the public perception. As an indication of this increasing fear of crime, it is noted that during the 1992 research, some 15,2 percent of respondents felt very safe walking in their residential area after dark, whilst the 1995 research showed that only 12,5 percent of respondents now felt very safe in the same situation. Table 5.4 provides results for the sections to follow.

**TABLE 5.4: PERCEIVED LIKELIHOOD OF BECOMING A VICTIM OF RAPE, ASSAULT, ROBBERY, HOUSEBREAKING OR THEFT - % IN GROUPS WITH HIGH OR VERY HIGH EXPECTATION**

CATEGORY	RAPE female only		ASSAULT		ROBBERY		HOUSE BREAKING		THEFT	
	%	No.	%	No.	%	No.	%	No.	%	No.
<b>RACE</b>										
WHITE	50	23	47	47	64	65	63	64	67	68
BLACK	40	18	42	42	53	54	59	60	61	62
COLOURED	39	26	41	41	61	60	67	66	66	65
ASIAN	32	15	39	37	66	63	66	63	71	68
<b>GENDER</b>										
MALE	**	**	35	68	53	103	58	111	62	120
FEMALE	40	83	49	100	68	140	69	143	70	144
<b>AGE</b>										
LESS THAN 35	41	43	45	88	61	120	66	130	68	133
35-49	42	28	41	55	60	81	59	79	66	89
50+	35	12	38	26	62	43	67	46	62	43
<b>EDUCATION</b>										
LESS THAN STD.9	43	30	43	51	64	76	66	78	66	78
STD.9-10	48	31	47	63	62	83	60	81	66	88
STD.10+	29	21	37	54	57	84	65	96	67	99

#### 5.4.1 Likelihood of becoming a victim of the crime of rape

Overall the crime of rape scored the lowest expected likelihood response of the five crimes with 25 percent of respondents registering a positive likelihood of becoming a victim. This result may be due to the fact that half of the survey population were male, and thereby



considered themselves unaffected by this crime. In this respect, although the crime of male rape is increasing globally, it is probably fair to say that in South Africa rape is primarily perceived as a crime of violence against the female. However, even with what appears to be a low rape victimisation score in relation to the other specified crimes, the recorded score can still be considered significant with nearly half the females, 40 percent, recording anxiety that they may become victims compared to 8 percent of males. Considering female response only, Table 5.4 indicates that White females record the highest expected incidence of rape, whilst the older age group and the higher educated fear this crime the least. An explanation of these results might reflect life styles, for example that older females probably spend more time in the home (although often rape occurs in the home and involves a perpetrator known to the victim). In this respect it is of interest to note that the forensic criminologist, Dr Irma Labuschagne, is known to argue that political and social unrest in South Africa has provided for a dramatic increase in rape offences against elderly women. However, the older age group within the study to hand appear less concerned about becoming a victim of the crime of rape than do many of the other sub-categories.

Alternatively, the two younger age groups may be (feel) more exposed to the crime of rape in relation to the time they spend outside of the home environment. Or, one may speculate, the more educated in society believe they are better equipped to protect themselves from the crime of rape by intelligently choosing to avoid perceived risk areas/places at dangerous times.

There is also the possibility here that the old philosophy of stereotypes is at work in these results. For example the belief that nice girls don't get raped because they dress properly, only go to the right places, or do not go about un-chaperoned. The opposite argument is that some women invite the crime through their social persona. Such women are perceived to dress provocatively, adopt gestures and postures which are seen as inviting and are generally assumed to be "asking for it". Conradie (1991:186) refers to this situation as "victim precipitation", arguing that "In this case the victim...is...regarded as a significant causal agent". This type of stereotypical assessment is now recognised to be meaningless, but it may be useful to note such perception in terms of the results given above, i.e., that uninformed respondents could be prejudiced in terms of stereotypical belief structures.

Perhaps another interesting response is from the Black female group. This group record just 10 percent below the White group: the second highest response to the crime of rape. One may be able to speculate that the high White female fear of rape might be correlative with the then apartheid situation in South Africa i.e., that White females fear reprisal for the apartheid conditions in the form of violent sexual abuse. But this surely cannot explain the relatively

high Black female response. In this respect it is widely accepted that Black females are culturally subservient in relation to Black males and that Black family structures are patriarchal in nature. Therefore, one might be tempted to think that Black female response to rape would be low because female emancipation within the Black group is less developed. Had Black female response to rape been low, it may have been possible to argue the radical feminist viewpoint, which according to Viljoen et.al. (1989:53) places emphasis upon the unequal distribution of power and authority between the sexes where "Patriarchy [is noted as] tantamount to female subordination and male domination". However, as response within this group is relatively high, this does not appear to be the case and one must consider the possibility that urban Black families, at least within the research to hand, emulate not only Elliot's nuclear family definition (which is oppositional to the patriarchal family structure), but also, points to a mythical perception of the crime of female rape which should be questioned in the same way as stereotypical projections on the type of female who gets raped.

#### **5.4.2 Likelihood of becoming a victim of the crimes of assault or robbery**

Overall, 42 percent of the survey population recorded a high or very high likelihood of becoming a victim of assault. Table 5.4 indicates that fear of the crime of assault is most keenly felt by Whites, females, the younger ages and the middle education group. The crime of robbery shows Asians, females, the oldest and the least educated as most fearful. The scores for likelihood of becoming a victim of the crime of robbery are higher in all categories than those recorded for the crime of assault, with 61% overall recording a high or very high likelihood of becoming a victim.

An explanation of these findings may lie in the type of crime. For example, one may be able to suggest that the crime of assault is quite different from robbery because it conjures up a crime picture of personal injury. Later in this chapter it is noted that South African respondents - like respondents elsewhere - are more concerned with personal victimisation and actual physical injury than with crimes of what one may term secondary harm (the stealing of effects/property). However, this proposition does not appear to be wholly supported by the findings concerning the crimes of theft and housebreaking hereunder, both of which score higher overall likelihood than the crime of assault.

#### **5.4.3 Likelihood of becoming a victim of the crime of housebreaking**

Table 5.4 shows that the crime of housebreaking recorded a 64 percent respondent likelihood level overall, and is feared most by the Coloured and Asian groups, females, the older age group and the least educated. This percentage likelihood for the crime of housebreaking is, as a generalisation, higher than the overall likelihood percentage recorded for the crime of assault. Naude et.al's. (1996:35) research concerning burglary (which can be roughly

equated to housebreaking for our purposes here) corroborates this high level of perceived likelihood by stating that "Many respondents...felt that it was likely or very likely that they would become victims of a burglary in the near future".

#### **5.4.4 Likelihood of becoming a victim of the crime of theft**

Table 5.4 shows that the likelihood of theft is by far the most feared crime within the survey population with 66 percent of respondents overall registering a perceived likelihood of becoming a victim. For example, all four race groups score this crime likelihood higher than any of the other four crimes of rape, assault, robbery and housebreaking. The Asian group record the highest response of all the stated crimes at 71 percent. As before, females, the younger age groups and the more educated record the highest positive scores.

In summation of the perceived likelihood of becoming a victim of the crimes of rape, assault, robbery, housebreaking and theft, it can be said that Whites fear robbery and theft, Blacks are more fearful of housebreaking and theft (although not the most fearful of any of the stated crimes), Coloureds also fear housebreaking and theft more than the other specified crimes and Asians are most fearful of theft. However, cross correlation of this summation with actual victims (Table 5.3), shows that Whites, males, the older age group and the most educated have been victimised the most. Therefore one can argue that the likelihood of victimisation is not wholly supported by actual victimisation rates. For example, whilst Coloureds and Asians are very fearful of becoming a crime victim, they actually suffer no more (sometimes less) than the other race groups. Overall, females see their likelihood of victimisation as higher than males when in actuality they have been victimised less than males.

A further cross correlation between actual victimisation and likelihood of victimisation (Tables 5.2, 5.3 and 5.4 respectively) showed that 68 percent of actual victims, compared to 60 percent of non-victims, are, not surprisingly, the most fearful group. It can also be noted that fear decreases with education whilst overall victimisation increases, and that fear and victimisation increase overall with age.

#### **5.4.5 Are you anxious that you might become a victim of crime in general**

64 percent of the total survey population, answered "yes" to this question. Table 5.5 indicates that the Coloured and Asian populations, the females, the older age group and the least educated have the highest fear/anxiety of becoming crime victims. This finding basically supports those reported above with respect to the sub-categories.

**TABLE 5.5: ANXIETY, VICTIM OF CRIME IN GENERAL**

CATEGORY	YES	
	%	No.
<b>RACE</b>		
WHITE	55	56
BLACK	52	53
COLOURED	77	76
ASIAN	72	68
<b>GENDER</b>		
MALE	58	111
FEMALE	69	142
<b>AGE</b>		
LESS THAN 35	63	124
35-49	60	80
50+	74	50
<b>EDUCATION</b>		
LESS THAN STD. 9	69	81
STD.9-10	61	82
STD.10+	62	90
<b>VICTIM IN PAST<sup>1</sup></b>		
YES	68	121
NO	60	133

Literature supports some of the findings in sections 4.1 to 4.5. For example, Hough & Mayhew (1983:23 & 24) note that, as a generalisation, it is females and the elderly who fear crime the most. They say that:

*Those who felt least safe were, quite clearly, women [and] the elderly...with a striking 60 percent of elderly women in inner cities feeling very unsafe.*

Hough and Mayhew further indicate that when respondents were asked if they worried about becoming a victim of crime, "A similar pattern of findings emerged: those who said that this was a 'big worry' tended to be concentrated amongst the elderly [and] women". When asked what crimes 'worried' them the most, "Nearly half said that they worried about burglary, a third about mugging, one in five about sexual attacks and, again, one in five about assault". This type of finding is also upheld by research conducted by Keane (1992:219) in Ontario. Keane's study distinguishes between what he terms formless fear (how safe do you feel in your area at night), and concrete fear (perceived likelihood of specific crime happening). He says there is a clear relationship between gender and fear, noting that "...females [are] more likely to see themselves as...victims". And, likewise, Naude et. al's. (1996:35) research in South Africa indicates that "[F]emales...felt the most unsafe...".

#### 5.4.6 Respondent likelihood of becoming a victim of a selected crime

As a check on expectation and fear of becoming a victim of crime, respondents were asked to rate their perceived likelihood of being mugged on the street, attacked in the home, or having a vehicle stolen. These three "selected" crimes were included in the research to simulate and extend in a more specific way, the five crimes previously measured, namely, rape, assault, robbery, housebreaking and theft. In other words, mugged on the street could loosely be aligned to being assaulted, attacked in the home to having one's home broken into and the stealing of a vehicle, to theft. The Likert scaling was also changed from "very high/none" to "will never happen/will almost certainly happen" which change invoked the alternating variation between positive and negative poles (see chapter 1, section 7.1[p.18]). The 0-5 scaling was re-coded to offer response categories of little, average or high expectations.

By far the highest response was to vehicle theft with 261 responses from a total of 350 recording in the high category for this crime. This finding is backed by Mayhew & Maung (1991:1), who in Home Office research findings No.2 on the 1992 British Crime Survey, report that "Vehicles are a very common target: one in five owners were victims of some sort of vehicle offence in 1991, 36 percent of all BCS crimes involved vehicles":

**TABLE 5.6: LIKELIHOOD OF VICTIM IN FUTURE - % WITHIN GROUPS WITH HIGH OR VERY HIGH EXPECTATION**

CATEGORY	MUGGED		ATTACKED IN HOME		VEHICLE THEFT	
	%	No.	%	No.	%	No.
<b>RACE</b>						
WHITE	56	57	35	35	78	79
BLACK	47	47	50	51	69	70
COLOURED	40	40	24	24	76	38
ASIAN	49	47	40	38	77	74
<b>GENDER</b>						
MALE	49	94	39	76	76	138
FEMALE	47	97	35	72	73	124
<b>AGE</b>						
LESS THAN 35	47	93	34	67	75	129
35-49	47	63	40	54	78	93
50+	51	35	39	27	69	40
<b>EDUCATION</b>						
LESS THAN STD.9	48	57	39	46	79	70
STD.9-10	54	72	37	49	74	86
STD.10+	42	62	36	53	73	105

Table 5.6 indicates that only the Black group recorded expectation less than 76 percent for the crime of vehicle theft, (Coloured group information was faulty due to a missing frequency of 50 responses, reported on more fully in section 9.4 of Chapter 1 [p.27].) Interestingly, Van Dijk and Mayhew's (1992:11) report on criminal victimisation in the industrial world indicates that:

*...prevalence rates for vehicle-related crimes correspond to...ownership levels [which is]... an indicator of the supply of available targets. A plentiful supply of vehicles seems to generate more crime - rather than, as might be imagined, criminal demand for vehicles being higher when targets are in shorter supply.*

The findings herein show that the older group and the most educated score the lowest expectation of car theft, but no evidence exists to suggest that these groups are non car owners. Perhaps one way of explaining this result is to suggest that, once again, more education may equal more wealth and that the resultant economic security permits more safety precautions, for example car alarms. Likewise, it might be suggested that older persons are less likely to be vehicle owners than the young and so have a reduced chance of falling foul to vehicle theft.

Also of interest in Table 5.6, is the higher response recorded by the older age group to the likelihood of being mugged (51%), as against their low response to the likelihood of being assaulted (38%) (Table 5.4). This finding may be indicative of the older generation's perception that they are more vulnerable to being mugged - a crime reported by the mass media as both plentiful and trivial - than to the crime of assault which somehow conjures up the perception of serious crime.

When cross-tabulations were run between the likelihood of falling victim to being assaulted or mugged, attacked in the home or having one's home broken into or, the stealing of a vehicle and theft, overall expectation of victimisation of *aligned* crimes recorded as follows:

assault/mugging - 26 percent  
attacked in the home/home broken into - 29 percent  
vehicle theft/theft - 53 percent

Consistency of responses between questions is not supported. Recorded percentages showed, for example, that 38 percent of those who recorded low expectation of assault record high expectation of mugging. 23 percent of those with low expectation of having the

home broken into had high expectations of being attacked in the home. 60 percent of those who recorded a low expectation of theft nevertheless had a high expectation of car theft.

Explanation for the lack of consistency between aligned crimes may have something to do with media coverage of crime in South Africa. For example, car theft appears to be "good story" for the mass media who, in providing visibility of car theft, may at one and the same time instil a perception of inevitability of occurrence in the public consciousness and, indeed, increase the occurrence of car theft itself. Whereas theft per se, unless dramatically large, does not provide the media with anywhere near as good an opportunity to sell its product. Similar explanations can be suggested concerning media coverage of the aligned crimes of assault and mugging and, housebreaking and attack in the home. For example, mugging is a far more in vogue concept in the press than assault, and attacks in the home can be said to be far more newsworthy than mere housebreaking.

However, there appears to be something of a link in public perceptions on the type of crime. For example, the overall high expectation of being mugged may point once again to respondents overall concern with physical harm as opposed to the type of secondary harm involved with housebreaking and theft (of anything, other than a vehicle). As corroboration of the publics' concern with physical harm crimes Naude et.al's. (1996:34) research adds another dimension to the equation with the suggestion that, public concern with this type of crime may be linked to:

*...the fact that these crimes involve serious financial losses, invasion of privacy, [and] personal threat and/or injury...often involves medical expenses and loss of earnings as a result of the injuries suffered.*

## **5.5 VIEWS ON PUBLIC INPUT INTO SENTENCING**

This question asked respondents to give their opinion on whether or not victims should have an input into the sentencing of offenders. The question is an important issue for the work at hand, arguing as it does that sentencing policy should reflect the wishes of the general public. A resounding 72 percent, nearly three quarters of the total survey population, answered 'Yes' to this question. As seen in Table 5.7, the highest calls for input into sentencing policy came from Coloureds, females, the older age group and the least educated.



**TABLE 5.7: INPUT INTO SENTENCING - % "YES" WITHIN GROUPS**

CATEGORY	YES	
	%	No.
<b>RACE</b>		
WHITE	82	82
BLACK	59	60
COLOURED	85	84
ASIAN	61	59
<b>GENDER</b>		
MALE	66	126
FEMALE	78	161
<b>AGE</b>		
LESS THAN 35	71	140
35-49	71	95
50+	77	53
<b>EDUCATION</b>		
LESS THAN STD. 9	78	92
STD. 9-10	71	95
ABOVE STD. 10	69	101
<b>ANXIOUS</b>		
YES	78	197
NO	63	90
<b>VICTIM IN HOME OR RESIDENTIAL AREA</b>		
YES	76	134
NO	69	154

This response reflects the anxiety levels recorded in Table 5.5 which denotes Whites and Coloureds, females, the older age group and the least educated as most anxious, and is, thereby, argued to correspond with recorded anxiety. Overall, 78 percent of those who are anxious about crime, as compared to 63 percent of those who are not anxious about crime, register a wish for input into sentencing the offender.

#### **5.5.1 Cross correlation of victimisation likelihood with a wish for input into sentencing**

In most cases, larger proportions of those with high expectations of becoming a victim wished to have an input into sentencing the offender. In this respect Fagan (1981:403-4) notes that although "...Public knowledge about the judicial system is [assumed to be] low ... in general, as knowledge increases, support decreases (especially as a result of first-hand experience as a litigant)". A rising crime rate could, therefore, be correlated with a heightened public knowledge, and this may allow one to extrapolate Fagan's argument to suggest that "...the public's fear and concern about a perceived rise in crimes and increased probabilities of victimisation..." will lead persons who feel threatened to be aware of penal happenings. This



awareness might then be suggested to predispose those who have high expectations of becoming a victim to support a call for input into the sentencing of perpetrators.

### **5.5.2 Cross correlation of actual victims with a wish for input into sentencing**

As might be expected respondents who claim to have been the victims of crime record the highest response for input into sentencing the offender, but the differential between actual victims and non-victims is relatively small: 76 percent victims, 69 percent non-victims. This result adds credence and justification to the thesis argument that the public want involvement with sentencing policy and practice, and furthermore, corresponds with Pease's (1988) suggestion that there is little difference in victim/non-victim response ratings to various aspects of criminal procedure (see section 6.4 hereunder) .

### **5.5.3 Relationship between demographic factors and input into sentencing**

Initial plots showed race and gender differences in respect of a wish to have input into sentencing. Obvious gender differences showed the White group to be the only race group in the survey to have more male than female respondents wanting input. Blacks and Asians showed the largest gender differences. Overall it appeared that White and Coloured response are similar and are different to Black and Asian response (see Table 5.7 above and figure 5.1 below).

A statistical regression model was utilised to determine the relationship between demographic factors and wish for input into sentencing, in order to identify what Glanz (1996:64) determines as "...which factors were significantly associated with...[respondent] choice".

#### **5.5.3.1 Modelling**

Logistic regression was undertaken to look at race, gender, age, education, language, religion, occupation and marital status as possible variables to explain response. The model takes values of the logit function, i.e.  $\log(\text{proportion answering yes to input}) / (\text{proportion answering no to input})$  from which the probability of answering yes, in terms of the explanatory terms, is estimated.

It was found that including race and gender would supply the most appropriate model. Although there was some indication that an interaction term gender by race might also be useful, the frequency counts were too small and thus it could not be included. Language also showed itself to be an important variable in that it could replace race. A word of explanation is necessary concerning language and race. Due to the research criteria which called for equal numbers of race respondents (100 x race), and the specific survey locale (Pretoria), virtually all White respondents used the Afrikaans language. Most Asians used the English language,

whilst most Black respondents used a vernacular language: hence the proposition that "language could replace race".

Observed proportions and fitted probabilities are given overleaf for the best model obtained using the "Probit procedure" in the SAS package. The final model is expressed as:

$$\text{logit } p = a + b [\text{gender}] + c [\text{race}].$$

A chi-squared test procedure assesses the importance of the explanatory variables, race, gender, etcetera, as they are added to the model (see section 10.3.2 in Chapter 1[p28]). Chi-square results showed that gender and race were both significant in explaining respondents' yes/no wish for input at 95 percent significance. Addition of further variables did not improve the model significantly. The logit model provided the following values of chi-square for improvement in the model on adding terms:

<u>Demographic</u>	<u>approx.Chi-Square</u>	<u>df.</u>	<u>Chi-Square (5%)</u>
<u>factors</u>			
gender	29.091	6	12.6
race	8.629	4	9.5
* gender + race	2.863	3	7.82
gender given race	5.766	1	3.84
race given gender	26.228	3	7.82

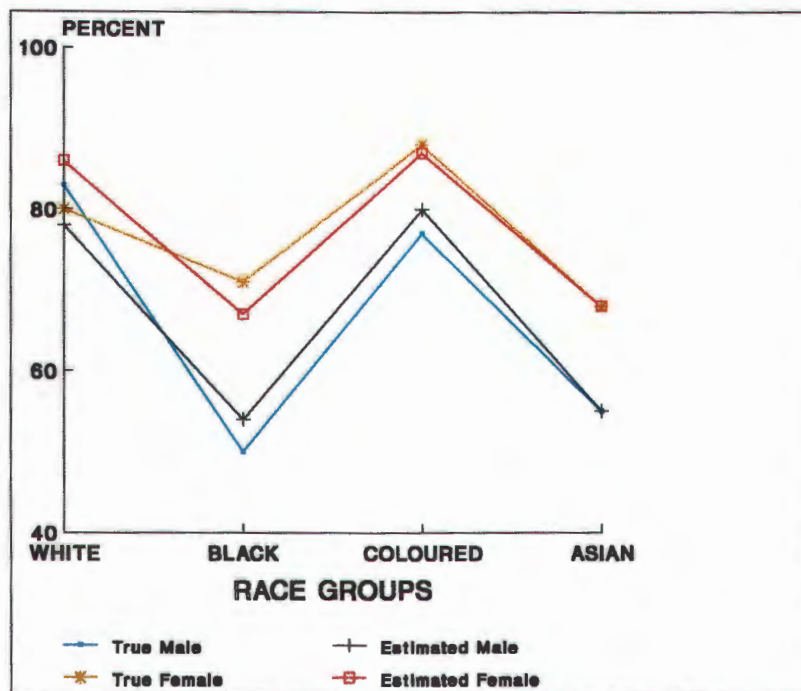
*\* The non-significant chi-square value when gender and race are in the model implies the model is satisfactory.*

True and model estimates of the proportions are:

<u>Race</u>	<u>Gender</u>	<u>True proportion</u>	<u>Model estimate</u>
White	Male	83.33	78.37
	Female	80.44	86.26
Black	Male	50.00	53.58
	Female	71.11	66.67
Coloured	Male	77.42	79.55
	Female	88.06	87.08
Asian	Male	55.10	55.14
	Female	68.08	68.05

All estimates, except those in the White group, are fairly close to the true proportions. In the White group, estimates follow the pattern of other races, i.e., female response greater than male response, rather than the true picture. Figure 5.1 provides a reproduction of the plots concerning race and gender attitudes towards sentence input for true and estimated proportions and clearly shows that Asian and Black response have little or no overlap with Coloured and White response. In addition it is obvious that, within the Black, Coloured and Asian race groups, males and females show significantly different responses.

**FIGURE 5.1: TRUE & ESTIMATED PROPORTIONS WISHING TO HAVE INPUT INTO SENTENCING BY RACE AND GENDER**



## 5.6 RESPONDENT SERIOUSNESS SCORES FOR SPECIFIC CRIMES

In section B of the questionnaire respondents were asked to provide seriousness scores for the twenty two specified crimes. Using the Likert scale of 1 = *very serious* and onwards to 5 = *not at all serious* (see Chapter 1, section 7 .1[p.17]) respondents were asked to rate the crimes in order of perceived seriousness.

Firstly, however, a word of warning concerning the measuring of crime seriousness is necessary. Parton, Hansel and Stratton (1991:73-74), identifying problems in the U.S. National Survey of Crime Severity (NSCS) note that "Historically...crime seriousness [has] given little attention to...definition...treating the term as a primitive concept for which investigators and respondents share a common meaning". The authors suggest that respondents who are provided with a brief description of a crime (a 'vignette'), and are asked to choose a scale value to represent their seriousness judgement, are merely providing a cognitive evaluation. They indicate that choice made against vignette descriptions of crime seriousness is

"essentially an assessment of victim harm", and that perceptions of harm are tied firstly to multidimensional attributes of the crime vignettes used by the respondents, and secondly to respondent characteristics, for example age and status. Therefore, respondent evaluation of crime seriousness finds the respondent relying upon what the authors refer to as an "accumulated understanding" which provides a stereotypic response.

On the other hand Corkery (1992:268), says that the vignette as a research tool should not be seen as an alternative, but rather as a complementary method to other ways of finding out. He says that simulation study can contribute to a general body of knowledge and theory development.

However, like warnings are apparent in nearly all research on judgements of crime seriousness, for example the British Crime Surveys (BCS), where Pease (1988:2) adds a different dimension to the difficulties involved in trying to offer an assessment of crime seriousness when he notes that "...[one] should not be blind to the methodological problems...". For instance, "...repeated offences and offences involving more than one element...[noting that]....The rated seriousness of the whole event is not a simple sum of the seriousness of its elements...[and, furthermore,]... judgements of offence seriousness may themselves vary according to factors like the assumed prevalence of an offence".

Notwithstanding these warnings, Pease (1988:2) has many positive comments to add to the argument. For example, he says that "...seriousness judgements emerge as a useful indication of general perceptions of crime... and that based upon earlier research, it can be said that the helpfulness of such an indication lies in the possibility to show "...that different groups of people agree which the more serious crimes are." He says that "By and large, the research to date seems to show that they do [agree]; this seems to be so across time within a culture". Bearing these comments in mind, Rossi et al. (in Pease 1988:2), consider that seriousness judgements are a "...conceptual dimension of criminality [which is] indispensable in everyday discourse, in legal theory and practice...". This dimension of knowledge on criminal issues is of primary import to this work, providing the possibility of a measurement of the seriousness with which Pretorians view a broad range of criminal events which may be of interest to law/policymakers. This was the *spirit* in which the study was undertaken.

In what follows, seriousness is considered from two points of view. Firstly seriousness is looked at in terms of percentage of respondents who classified the chosen crimes as serious or very serious, later comparing, where possible, these seriousness scores with those from the BCS. Secondly, considering seriousness in terms of mean scores over all respondents,

produces an average mean seriousness score for each crime (section 6.5), utilising Pease's (1988:34) method as a prelude to the discussion on sentencing in Chapter 6 to follow.

### **5.6.1 Seriousness ratings**

The first eleven crimes were crimes of what might be termed a general nature. These 11 crimes were included within the research because, having been taken directly from the 1984 British Crime Survey (BCS), they provide some correlative material between the United Kingdom and South Africa. The 11 general nature crimes were:

- B1 - Someone being mugged and robbed
- B2 - A woman being sexually molested and pestered
- B3 - Someone being attacked by strangers
- B4 - A home being broken into and something being stolen
- B5 - A car being stolen for a joyride
- B6 - Someone smoking cannabis or marijuana (dagga)
- B7 - Someone fiddling their income tax
- B8 - Someone being insulted or battered by strangers, but not in a serious way
- B9 - A prostitute soliciting for trade
- B10 - Someone stealing R10 worth of goods from a shop
- B11 - Someone stealing R100 worth of goods from a shop

The second eleven crimes were of a more specific nature (see Childs explanation of what this means in Annexure "A": the sections of the questionnaire). The 11 specific nature crimes were:

- B12 - Someone murders another...
- B13 - Someone guilty of the crime of manslaughter...
- B14 - The rape of someone...
- B15 - The act of terrorism...
- B16 - Someone acts fraudulently...
- B17 - An act of corruption...
- B18 - An act of political intimidation...
- B19 - The selling of illegal drugs
- B20 - An offence of assault and robbery...
- B21 - Driving a motor vehicle whilst over the legal alcohol level
- B22 - Driving a motor vehicle whilst over the legal alcohol level and causing the death of an innocent victim

From the original 5 point Likert scaling, the responses were reduced to three categories: "serious", "average" and "not serious". It is suggested, that this reduction of categories provided for a more meaningful statistical representation of the results.

Shown below in Table 5.8 is how respondents ranked the 22 crimes overall, followed by respondent rankings using the 3 reduced seriousness categories and the distinction of "general nature" and "specific nature" crimes.

**TABLE 5.8: OVERALL RANKING OF CRIMES BY % CLASSIFYING AS SERIOUS OR VERY SERIOUS**

RANK	CRIME		Serious or Very Serious	
	Ref.	Description	%	No.
1	B14	Rape	99	396
1	B22	Driving / alcohol causing death	99	396
3	B12	Deliberate murder	98	392
4	B19	Selling illegal drugs	97	386
5	B15	Terrorism	96	383
6	B20	Assault and robbery	95	379
7	B21	Driving / alcohol - no death caused	90	361
8	B2	Sexual molested and pestered	89	355
9	B18	Political intimidation	88	350
10	B1	Mugged and robbed	85	341
10	B3	Attacked by strangers	85	340
12	B17	Corruption	79	314
13	B4	Housebreaking and theft	78	310
14	B13	Manslaughter	75	301
15	B16	Fraud	73	290
16	B6	Smoking cannabis	68	273
17	B7	Fiddling income tax	67	269
18	B9	Prostitution	62	249
18	B11	Stealing R100 worth of goods	62	247
20	B5	Car stolen for joyride	61	243
21	B10	Steal R10 worth of goods	52	208
22	B8	Insulted / battered by strangers	48	*192

\* Unfortunately a typographical error occurred in both the English and Afrikaans reproduction of this question from the British Crime Survey. The question should have read: someone being insulted or bothered by strangers, although it is noted later that this error seems not to have made a significant difference to the relative ranking positions between the BCS and this research.

Of the 11 *specific nature* crimes, the rape of someone and driving whilst over the legal alcohol level causing the death of an innocent victim both scored 99 percent seriousness. Overall, the *specific nature* crimes involving bodily harm scored considerably higher than the crimes of



a *general nature*. This response is upheld by The National Survey of Crime Severity where the executive summary notes that "The overall pattern of severity scores indicates that people clearly regard violent crimes as more serious than property offences" (1985:vi). And, also by The British Crime Survey where Pease (1988:25) summarises this aspect of bodily harm crimes in relation to property crimes with the words: "Personal crimes are judged [by respondent populations] to be more serious than property crimes".

As already intimated, one may be able to explain the seriousness ranking of crimes in terms of the public's concern for innocent victims. For example, it is variously noted that the highest ranked crimes involve harm to an individual: perhaps indicative of a form of co-responsibility for one's fellow human being. Such a proposition can be substantiated by noting that crimes like housebreaking, prostitution, and indeed the possession and smoking of drugs - which in themselves are serious misdemeanours - fall low on the seriousness ranking (Table 5.8). In this respect one can argue that housebreaking does not (in essence) involve the personal or physical harm of an individual: harm is related to inanimate (lifeless) entities. Further, crimes like prostitution and the smoking of drugs involve individual choice and this, it can be argued, places them into a category of secondary harm. With this suggestion in mind, the difference in rank between public seriousness for rape (99%) and prostitution (62%) might be said to highlight a particular public morality which is rooted in the social philosophy of Utilitarianism. In other words, that the public tend to equate crime seriousness with the collectivist tradition of social order. Seen in this way, individuals can be said to rationally pursue their own self-interests as aggregates of atomised individuals driven (and perhaps, united) by self interest, but at the same time, recognising the social contractual order of society which limits their individual choice in terms of the good of all. If laws are broken, in other words, choice is shown to be misdirected in relation to the lawful agreed upon rules - as is the case with harm to victims - then one may proffer the notion that the public attitude towards seriousness involves the forfeiture of self-interest in favour of a collectivist morality.

### **5.6.2 Comparison of the research findings with the 1992 and 1996 South African UNICRI crime surveys**

It is insightful to look at the South African research undertaken for the UNICRI survey of crime in the developing world in a little more detail. It should, however, be stated that the UNICRI surveys utilised a different methodological tool (questionnaire) to this research, and the surveys were undertaken in Johannesburg and not Pretoria. The UNICRI research investigated seriousness for only the victims of crime and categorised responses as serious. On the other hand, this research surveyed both victims and non-victims and combined serious scores with very serious, fairly serious or not serious. Notwithstanding the differences between survey methods, some comparisons are still useful as *trend indicators*.

Tabularised comparison between the 1992 and the 1995 South African UNICRI surveys provides the following information:

<u>Percentage registering "very serious/serious"</u>		
	'92 UNICRI (J'burg.)	'95 UNICRI (J'burg.)
	% v.serious	% v.serious
<u>Crimes</u>		
Burglary	74,0	69,8
Robbery	68,5	73,8
Car Theft	91,0	87,9
Sex.off. (f) *	84,8	66,7
Ass/threat	51,1	51,2

\* females only

Overall, it would appear that crime figures showed decreasing seriousness between the two S.A. UNICRI surveys, except for the crime of robbery.

Although as already stated, direct comparison of the S.A. UNICRI surveys and these research findings is impossible, one or two points can be made. For example this research shows far higher overall seriousness ratings for similar crimes than both the 1992 and 1995 S.A. UNICRI surveys. It is also noted that seriousness ratings for robbery and assault/threat rise dramatically between the 1992 S.A. UNICRI survey and this research (1993) and fall again in the 1995 S.A. UNICRI research. As South Africa approached the first democratic elections between these years (1992-1993), the higher 1993 rates may be an indication of more destabilisation in the country at that time - a situation which seems to have corrected overall in the 1995 UNICRI scores.

### **5.6.3 Comparison between this research and The British crime survey**

Here the discussion centres on the first 11 "general nature" crimes contained within the questionnaire. The reason for this division between crimes is, as already indicated, that the first 11 crimes were taken directly from the 1984 British Crime Survey in order to provide correlative material with which to check for similarity of results between this research and the British research. As well as the similarities given below at 6.3.1, there are also differences between the two research projects which call for a word of explanation before moving on.

Firstly, the 1984 British Crime Survey was much larger than the South African research study undertaken for this work, viz., 11000 households in England and Wales as opposed to 400 ("elements"/households) in Pretoria. The British Crime Survey consisted initially of two questionnaires - a demographic questionnaire, and a main questionnaire which primarily



elicited information from the survey public concerning victimisation. Thereafter, all crime victims and a sample of non-victims rated the seriousness of fourteen standard offence descriptions. Pease (1988:6) says that this was to determine which offences were seen as serious, which as trivial, and whether there was consensus among groups in ratings.

The fourteen crimes covered by the 1984 British Crime Survey were reduced to eleven in this research for a specific reason in each case. Crime one on the BCS was, "A woman being raped". This question was excluded from the first 11 crimes in the research to hand because a like crime was offered in the "specific nature" section of the questionnaire. Question seven on the BCS was, "A private home or property being damaged by vandals". This question was excluded from the research totally, because it was felt that the concept of "private home" would prove confusing for South African respondents. And finally, question nine on the BCS, "Someone fiddling social security" was not taken up within this research because social security is an unknown concept in South African society.

Pease (1988:6) also indicates that "It is important to stress that consensus here [BCS results] is at the level of demographic groups, not at the level of individuals. Individual differences in judgements of offence seriousness are to be expected. Only if differences between broad social groups are found will the usefulness of seriousness judgements be threatened". He further notes that "The proportion of people regarding a crime as serious varies widely according to the crime, and does so in accordance with a 'common sense' view of seriousness". These points can be argued to correlate with the research findings herein.

#### **5.6.3.1 Similarities between the 1984 British Crime Survey and this research**

The statistical results provided by the 1984 British Crime Survey show several similarities with this research. Firstly, Pease (1988:10) notes that "...there appears to be no general change in victim ratings of the seriousness of "their" offence type [as opposed to non-victims]". This pattern is upheld within the findings herein, where there is no more than a 2 percent differential between the seriousness ratings of victims and non-victims. He notes that social class differences in ratings of offence seriousness were slight, but the age of respondent does have an effect. Pease says that there is a clear relationship between greater age and a view of crime as more serious. In this respect he reports that "This is true for crimes with victims and for crimes without victims, so it cannot be simply a result of a line of thinking..." (1988:10). He says that there is an exception to this general pattern in sexual offences and stranger attack.

Similarities can be noted within this research, for example that older people are consistently more concerned about crime in general and that they rate crime seriousness higher than the

younger age groups (although in actuality, according to these results, they are less affected), and that this group hold higher expectation of crime against them. The BCS findings show that the younger age group are more tolerant of property and victimless crimes, but that this tolerance disappears with violent and sexual offences. Likewise, it is apparent from the responses of the younger respondents herein that this group appear less concerned with crime in general, save for the bodily harm crimes.

Pease (1988:10) suggests that two explanations for the differences between old and young are possible. One is what he calls the 'era' effect where he says that people who are now elderly hold, and have always held, attitudes at odds with those now held by the young and which the young will continue to hold as they get older, and two is that there is a maturation effect, meaning that the young at any time in history show the same difference in attitude from their elders, with age producing a predictable change in attitude. Pease (1988:10) argues that "It is possible to gain some idea of which of these two general explanations is correct" and he indicates the 1972 research of Durant et. al. (in Pease 1988:10) to argue that "...agreement on which offences are serious is effectively uniform across age bands...[extending] to personal crime as well as offences involving property". He says that this view would seem to favour the 'era' account rather than the age explanation "...suggesting that there has been a change in social climate over two decades, with property offences now being regarded as less serious...[whilst] offences against the person are relatively unchanged" (1988:10).

Female response in the BCS can also be likened to the findings herein, and according to Pease, to the US data. Pease (1988:10) indicates that "There is...a tendency for women to regard offences as more serious than do men...particularly...offences with no immediate victim...like fiddling tax and driving while over the legal alcohol limit...[but] no sex difference in the [female] data for the most serious offences: rape, mugging and sexual molestation" are indicated. This heightened female response to crime seriousness is visible in this research where it has been shown that female respondents are more concerned and more fearful about crime. Females in the research herein also provide higher seriousness scores for all crimes, as will be seen in section 6.4 below.

#### **5.6.3.2 Correlative seriousness rankings between the 1984 British Crime Survey and the South African research**

Before considering possible correlations between the rankings of the 1984 BCS and this research, it should be reiterated that the British research was (is) not the same as the research undertaken here. A total of 14 crimes were offered to British respondents - all in the form of what Doob & Roberts earlier identified as "one dimensional" questions: they offered

no specific knowledge of either the crime, the victim or the offender - whilst this research utilised 11 of the British crimes, and then went on to offer 11 more specific crimes to South African respondents. Looking at the like crimes within both surveys does, however, provide some correlative material, but comparisons should be treated with caution due to the inherent methodological differences between the two pieces of research.

Notwithstanding these differences, considering seriousness ranks on the basis of percentage of respondents who classify the crimes as serious or very serious, the 1984 BCS and this research do appear to correlate in some respects, indicative of the hypothesis that different groups of people do tend to agree upon which crimes are most serious. For example, the crime of rape is ranked first in both surveys and the three least serious crimes - insult, prostitution and stealing R10 (pounds 5) - fall into the least 5 serious crimes on both rankings. Both surveys rank what this study later refers to as secondary harm crimes, lower than the actual victim/bodily harm crimes and the two property crimes fall lower on the ranking table than all but two of the bodily harm crimes, and over half of the secondary harm crimes. Pease (1988:12) says of the BCS findings in this respect that:

*The offences judged most serious were rape, mugging/robbery, sexual molestation and stranger attack...the offence rated least serious was shoplifting of goods value [pounds] 5, with soliciting for prostitution regarded as only slightly more serious.*

It can, therefore, be argued that the findings herein appear, given the different social climate in South Africa and the dissimilarities in the methodological tool (questionnaire), to be broadly upheld by the British research study, thereby confirming Pease's earlier contention that globally different groups of people tend to agree which the more serious crimes are.

#### **5.6.4 Mean seriousness scores**

Adjusting the scores so that 5 = very serious and 1 = not serious, a mean score over all responses was calculated for each of the 22 crimes, by as mentioned above, sub-dividing the crimes into:

- a) those involving bodily harm to victim - (10 crimes)
- b) those involving secondary bodily harm to victim - (10 crimes)
- c) property offences - (2 crimes)

These sub-divisions were then ranked on the basis of mean seriousness score providing the information in Table 5.9. This method emulates Pease's (1988:variously) statistical analysis in

the 1984 British Crime Survey and is later carried forward in considering sentencing in Chapter 6 to follow.

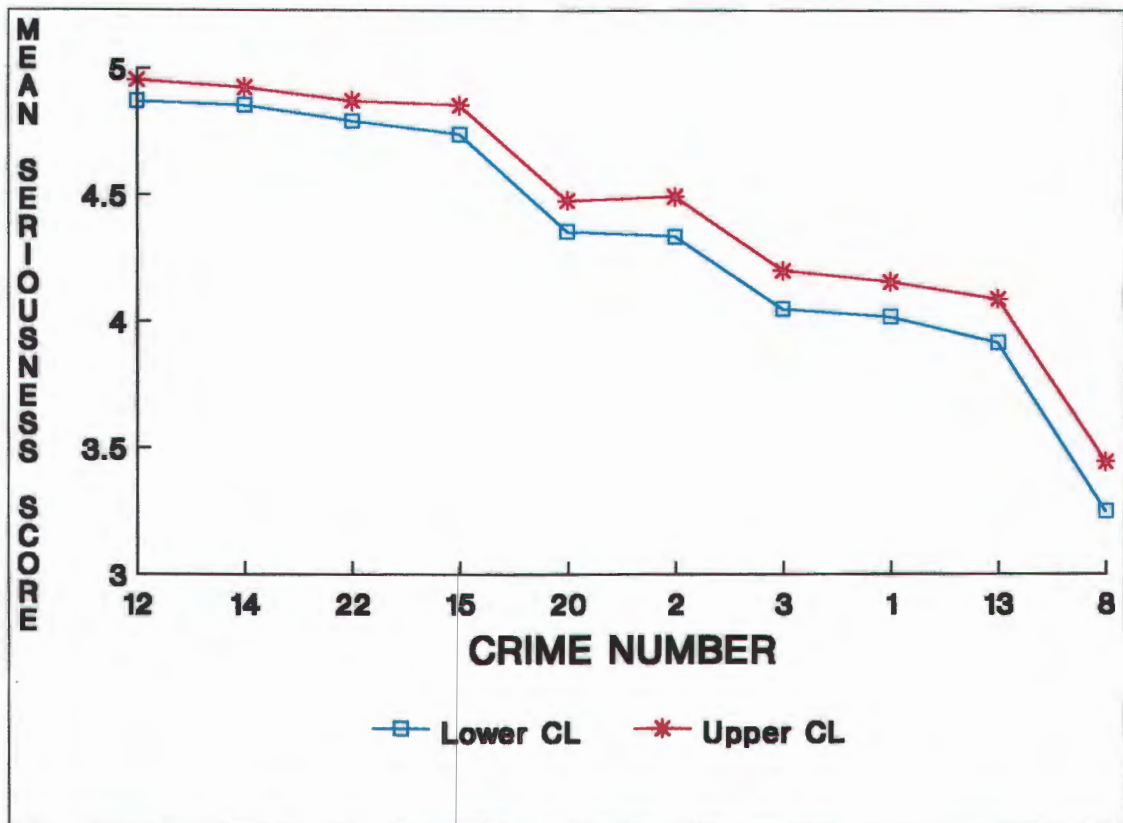
**TABLE 5.9: RANKING OF CRIMES BY MEAN SERIOUSNESS SCORE**

RANK	BODILY HARM CRIMES			SECONDARY HARM CRIMES			PROPERTY HARM CRIMES		
	Ref	CRIME	MEAN SCORE	Ref	CRIME	MEAN SCORE	Ref	CRIME	MEAN SCORE
1	B12	Murder	4.91	B19	Selling drugs	4.79	B4	House-breaking	3.96
2	B14	Rape	4.89	B21	Alcoholic driving	4.34	B5	Car steal joyride	3.55
3	B22	Alcoholic driving causing death	4.83	B18	Political intimidation	4.24			
4	B15	Terrorism	4.79	B17	Corruption	4.08			
5	B20	Assault	4.42	B16	Fraud	3.87			
6	B2	Sexual Molestation	4.42	B7	Fiddle income tax	3.75			
7	B3	Attack by strangers	4.13	B6	Smoking cannabis	3.72			
8	B1	Mugging	4.09	B11	Steal goods R100	3.63			
9	B13	Manslaughter	4	B9	Prostitution	3.58			
10	B8	Insult / battered by strangers	3.35	B10	Steal goods R10	3.27			

#### 5.6.4.1 The bodily (personal) harm crimes

The new sub-divided crimes indicated within Table 5.9 show that, of the bodily/victim harm crimes, those of deliberate murder, rape and driving whilst over the legal alcohol level causing the death of an innocent victim, were considered to be the most serious crimes, followed by the crime of terrorism. Mean seriousness scores percentage differences between the first three crimes in this category are minimal at 1.63 percent. Someone being insulted or bothered by strangers, but not in a serious way, ranked last (10th) in this category, provided considerable mean differential between the crime of murder at 31.8 percent. The 95 percent confidence intervals shown in figure 5.2 illustrate the gradation of seriousness scores among the ranked crimes and shows significant differences in mean scores between those ranked 1 to 4 and those ranked 5 to 10 in Table 5.9.

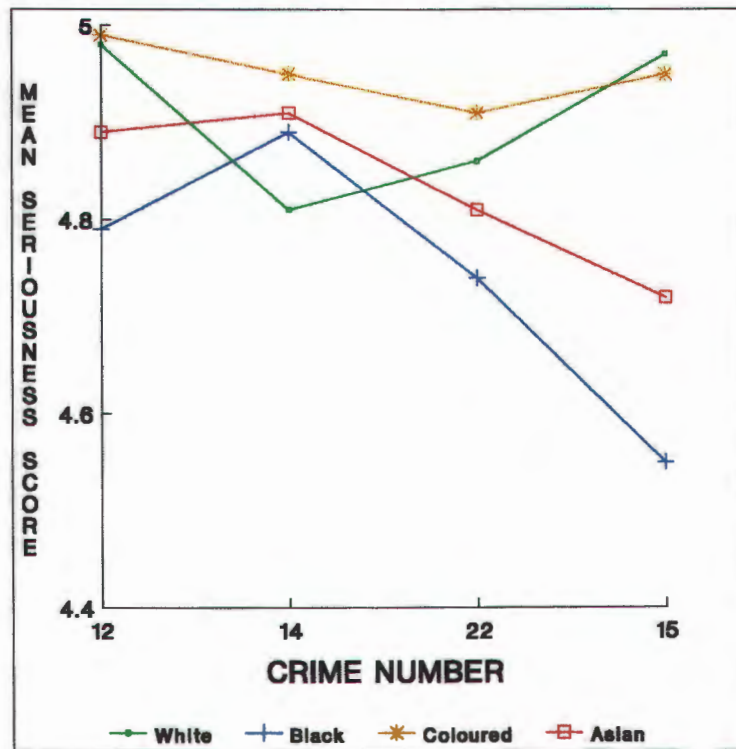
**FIGURE 5.2: 95% CONFIDENCE LIMITS (CL) FOR MEAN SERIOUSNESS SCORES FOR BODILY (personal) HARM CRIMES**



Looking at a statistical breakdown of subgroup categories, it is noted that, overall, respondents within subgroups appear to agree on the seriousness rankings of the bodily/victim harm crimes (upholding Pease's (1988) research report on agreement of seriousness mentioned earlier).

In terms of mean score, Blacks and Asians rank rape first whilst Whites and Coloureds rank murder first. The more educated tend to score more conservatively, scoring rape equal to murder. Figure 5.3 illustrates mean scores for race and education levels for the top 4 most serious crimes. Overall, Coloureds, females and past victims provide higher seriousness scores for most crimes whilst scores from Blacks and the more educated are more conservative.

**FIGURE 5.3: BODILY (personal) HARM CRIMES: MEAN SERIOUSNESS SCORES OF MOST SERIOUS CRIMES: firstly by race then by level of education**



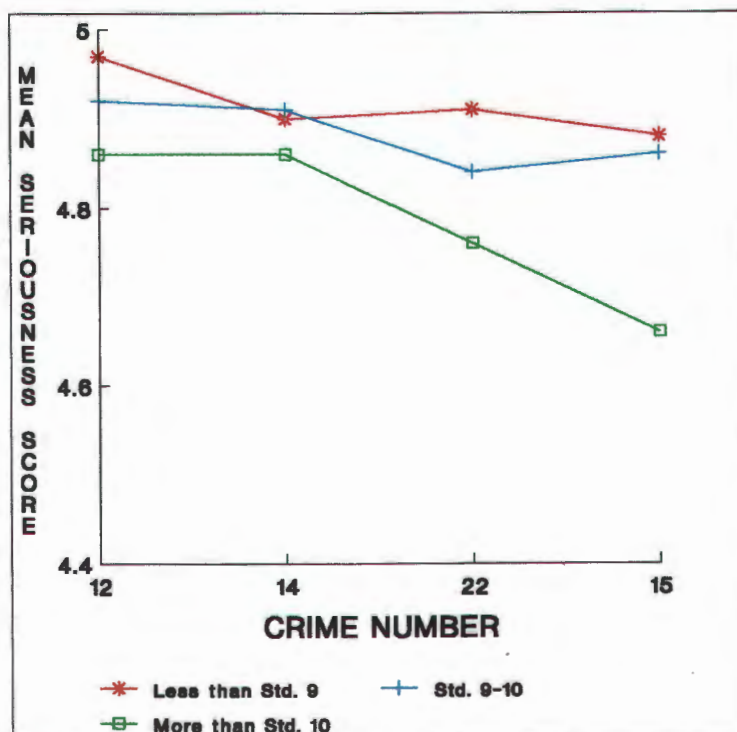
**KEY**

**B12 : Murder**

**B14 : Rape**

**B22 : Driving with alcohol causing death**

**B15 : Act of terrorism**





The same trends are apparent within subgroups dealing with deliberate murder as opposed to manslaughter, but there is also another interesting aspect: intention appears to play a role in the public's perception of seriousness. In this respect, the crime of deliberate murder provided respondents with no indication of crime situation but merely stated that the crime was deliberate (or premeditated). On the other hand, manslaughter (un-premeditated murder), offered respondents a crime setting which can perhaps be argued to have diluted the seriousness of the crime somewhat. The death of an innocent victim occurred in both crimes, but respondent differential of seriousness between the two provided a full 18.5 percent leniency in seriousness score in the case of manslaughter (Table 5.9). This result appears to show that in the eyes of the survey public, at least for many respondents, intent rather than action is the deciding factor in perceived seriousness.

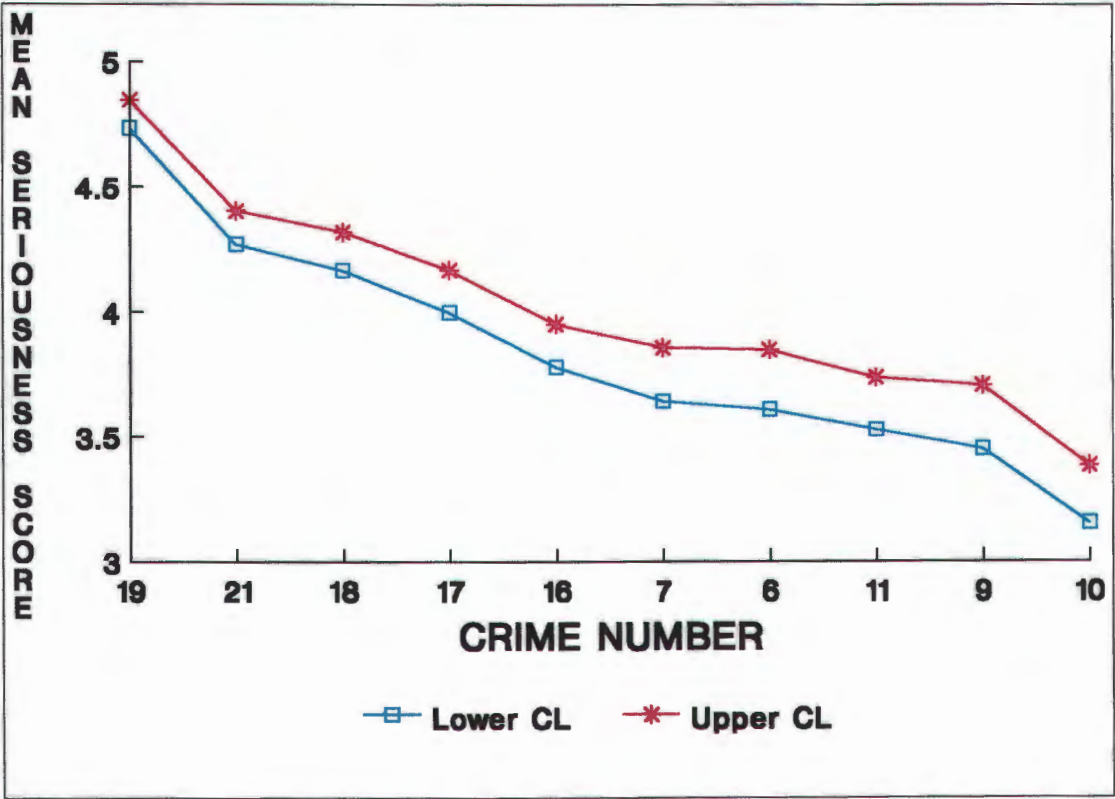
The findings also seem to show little difference in the seriousness scores of victims and non-victims. Such results may have something to do with Parton, Hansel and Stratton's (1991:73) discussion on the characteristics and status of respondents (see section 6.). However, various other factors may play a role in how people perceive seriousness, for example cognitive knowledge and language nuances, so caution is required when interpreting results. For example, Childs (1965:15) made the point (see Annexure "A": the sections of the questionnaire) that "perceived beliefs and definitely worded statements" have an effect upon respondent seriousness scores and he argued that specifically worded crime situations, at the very least, provide for closer like consideration of a crime between survey respondents. With this in mind, Doob and Roberts's (in Bottoms 1988:131) research into public punitiveness indicates that "One dimensional questions [invariably] give one dimensional answers", with the authors noting that when respondents were "...asked simple questions [about crime]...Canadians seem to react with severity". Walker, Hough and Lewis's (in Bottoms 1988:179) research into the same subject indicates a link between the two ideas put forward here concerning the way in which crime questions are presented to a respondent. They indicate that "...choices [appear] to depend on the seriousness with which...[respondents] regarded the offence - [perhaps again indicative of Parton, Hansel and Stratton's status factors]...[and]... also...on what [and how much] respondents are told about the offence". In other words, the presentation of crime survey questions have a definite effect upon the results obtained.

Another point worthy of note is that seriousness scores do not appear to be affected by either being a victim or not, or by being anxious or not. Crime seriousness appears to be a concept about which people in general can find a common ground.

5.6.4.2 The secondary harm crimes

Figure 5.4 indicates mean scores and 95 percent confidence intervals for the secondary harm crimes as detailed in Table 5.9, and highlights significantly different gradations of seriousness to those for the bodily harm crimes (section 6.4.1 and figure 5.3 above).

FIGURE 5.4: 95% CONFIDENCE LIMITS (CL) FOR MEAN SERIOUSNESS SCORES FOR SECONDARY HARM CRIMES



For example, Table 5.9 shows that the most serious secondary harm crime of selling illegal drugs has a mean seriousness score which is 2.4 percent lower than the most serious bodily harm crime of murder. And, the secondary harm crime of driving whilst over the legal alcohol level provides a full 10 percent drop in seriousness score compared to the bodily harm crime of driving whilst over the legal alcohol level and killing an innocent victim. Also of interest is the difference in seriousness scores between the bodily/secondary harm crimes relating to drugs. The secondary harm crime of smoking drugs received a seriousness score which is over 22.3 percent below the bodily harm crime of selling (pushing) drugs.

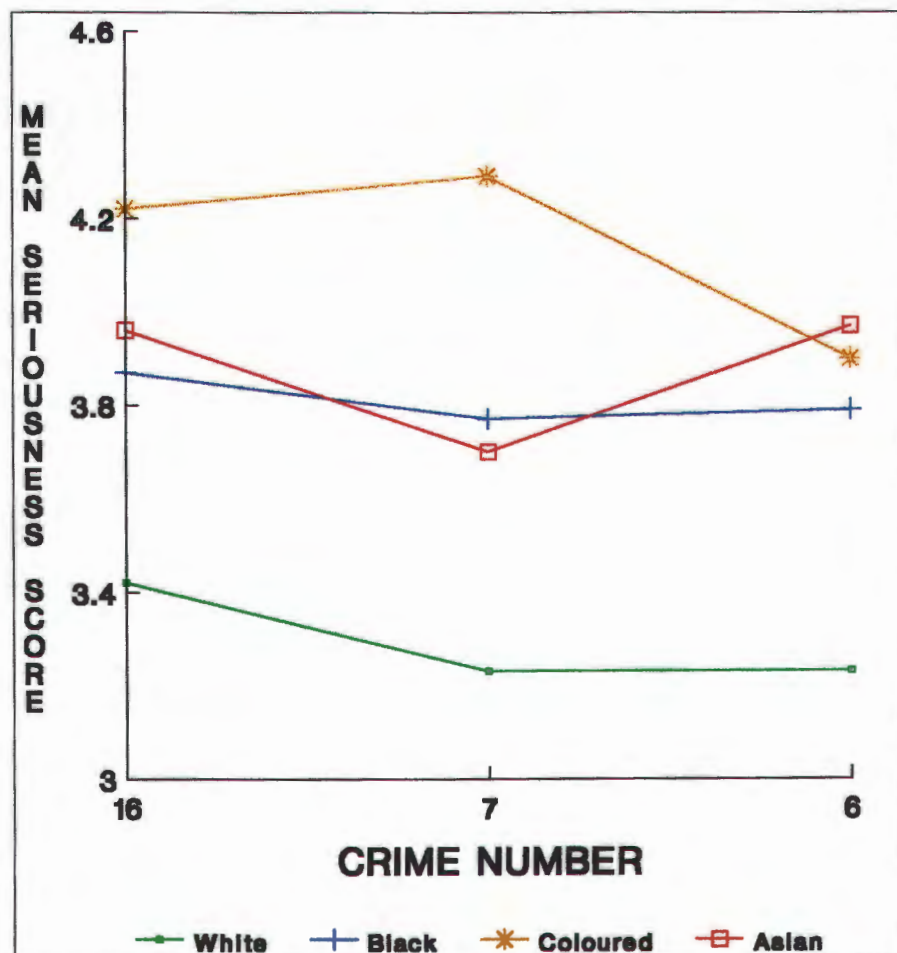
Another point of interest is the secondary harm crime of prostitution compared to the bodily harm crimes of rape and sexual molestation. The relatively low mean score for prostitution, as opposed to the higher scores for rape and sexual molestation (both of which involve an



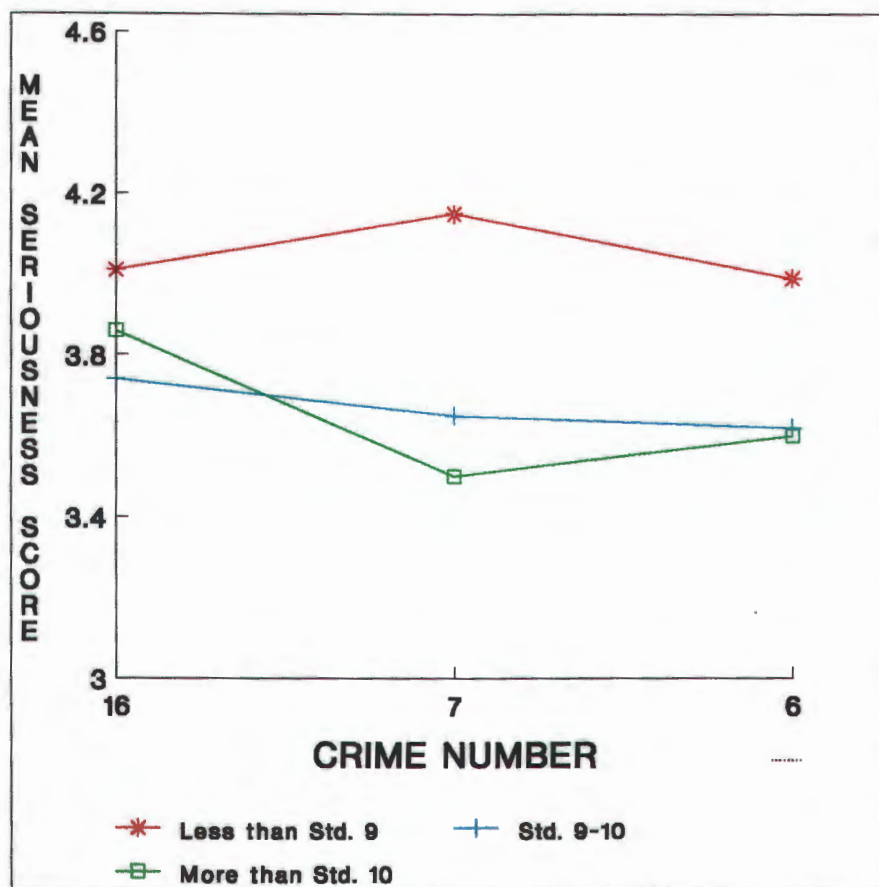
innocent victim) can be argued to uphold the notion of respondent concern for innocent victims, and this in spite of the retentionist stance taken by respondents later in Chapter 6 on decriminalisation of prostitution and the smoking of dagga. Therefore, one may argue with some conviction, that these scores clearly show respondent lack of concern for those who choose to become victims, i.e., choose to use drugs or become prostitutes.

Looking at a statistical breakdown of sub-groups, it is noted that, overall, respondents within sub-group categories appear to agree on the seriousness scores of the secondary harm crimes, although one or two differences are worth noting and are illustrated in figure 5.5

**FIGURE 5.5: SECONDARY HARM CRIMES: MEAN SERIOUSNESS SCORES OF LESS SERIOUS CRIMES: firstly by race then by level of education**



**KEY**  
**B16 : Fraud**  
**B7 : Fiddling income tax**  
**B6 : Smoking cannabis**



For example, the fiddling of income tax is considered more serious by the Coloured group than fraud, and the smoking of dagga is considerably less serious for Coloureds than for the other three race groups. As a generalisation, however, the Coloured group and the least educated give higher mean scores for many of the secondary harm crimes (as was the case with the bodily harm crimes), whilst Whites tend overall to provide lower scores. Therefore, as with bodily harm crimes, Coloureds, females and the older age group appear to give higher seriousness scores for the secondary harm crimes which do not involve a choice factor, and scores again decrease as education levels increase.

#### 5.6.4.3 The property crimes

Table 5.9 shows that of the two crimes in this category stealing a car for a joyride provides a 10.4 percent lower seriousness score compared to the crime of housebreaking. It should be noted that both these crimes have seriousness scores close to the bottom ranks of the secondary harm crimes. This result, once again, reiterates Pease's (1988) finding that respondents per se place property crimes lower in seriousness than those crimes which involve bodily victim harm.

## **5.7 CONCLUSION**

In this chapter the demographic profile of the respondents, the amount of victimisation and respondent fear of crime in society, and respondent seriousness ranks and scores have been discussed. It has been variously shown that the fear of crime far outweighs the actuality of becoming a crime victim. It was noted that the crime of theft is the most feared crime and the crime of rape the least. It was also shown that there is overwhelming support, both from victims and non-victims alike, for the inclusion of lay person involvement in sentencing practice, with actual victims and the most fearful of crime calling the loudest for such an involvement. Where possible, the chapter made note of correlative findings between The British Crime Survey and The National Survey of Crime Severity.

In respect of crime seriousness, the chapter compared South African research findings with findings from the 1984 British Crime Survey and discussed similarities and differences in relation to the South African findings and the report on the 1984 British Crime Survey.

In the chapter to follow respondent sentencing choice in relation to the crimes offered for seriousness scores within this chapter are discussed. Also in Chapter 6 consideration is given to respondent sentence options in relation to specific mitigating circumstances and finally, respondent views on the decriminalisation of five specified crimes. The findings within chapter 6 are once again, where possible, compared with the findings of the 1984 British Crime Survey in order to provide a correlative discussion, and are linked to the findings of respondent seriousness scores reported herein. .

**CHAPTER 6**  
**THE RESEARCH FINDINGS**

**RESPONDENT VIEWS ON  
SENTENCING, MITIGATING  
FACTORS AND  
DECRIMINALISATION**

## CHAPTER 6

### THE RESEARCH FINDINGS

#### RESPONDENT VIEWS ON SENTENCING, MITIGATING FACTORS AND DECRIMINALISATION

##### 6.1 INTRODUCTION

In section C of the questionnaire, respondents were asked to choose what, in their opinion, was a fair sentence for each of the twenty-two crimes previously given seriousness scores. As noted in the introductory chapter, seriousness and sentencing were kept separate so as to provide a "distance" between the two concepts and, thereby, to furnish a check on respondent wishes. No attempt is made to link sentence with victimisation experience or perceived risk of victimisation due to the high percentage of respondents ([70%], see chapter 5, section 3.1 [p.129])) classifying as non-victims. And, before moving on, it should be reiterated here that respondents were reminded of the *specific nature* crimes by the use of short one or two worded sentences (see section 7.3.1, Chapter 1 [p.19]).

Twenty three sentencing options were explained to respondents who were then asked to choose a sentence for each crime. The sentence options ranged from death and imprisonment, through fines and whipping (cuts), to correctional supervision and the suspended sentence. As indicated elsewhere, all sentence options were taken from the (then) South African legal statute effective at the time of the survey: the new Constitution has now removed the death penalty and whipping from Statute (see Annexure "A" for full sentence definitions). The twenty three sentence options were:

1. the sentence of death
2. imprisonment, including imprisonment for life : 10 sub-term options
3. periodical imprisonment
4. declaration as an habitual criminal
5. committal to any institution established by law
6. a fine: 5 sub-amount options
7. whipping
8. correctional supervision
9. imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner

## 10. the suspended sentence

As sentencing forms the main thrust of the study, each of the twenty-two crimes is addressed separately in relation to respondent sentencing preference, i.e the percentage of respondents choosing a particular sentence option for a particular crime. The crimes in section B of the questionnaire now take up reference identification pertaining to section C of the questionnaire, viz., crime B1 now becomes crime C1 and so-forth. The crimes are then re-grouped into the 3 categories previously explored in Chapter 5 (bodily, secondary harm and property) and sentencing within these categories are examined. Thereafter the focus is on the correlation between mean scores of seriousness (Chapter 5) and sentence (herein), as a forerunner to the South African sentencing guide provided in Chapter 7 to follow. Finally, mitigation and decriminalisation are briefly discussed. However, to begin with, the sentencing debate is re-visited in order to place the chapter into context.

## 6.2 THE SENTENCING DEBATE REVISITED

As discussed previously, considerable research has been undertaken by the British and United States Governments (and others) to discover, amongst other things, the general public's wishes on sentencing practice. In many instances the research findings from various other areas of the world, once again, appear to support the documented findings within the British Crime Surveys (BCS), and thereafter, this research on respondent sentence preference. Similarities can be noted in several areas and, therefore, Chapter 6 offers a brief discussion of *other* research findings prior to a more in-depth look at the findings of the British research, later in the chapter. Once primary similarities between studies have been identified, South African respondent's choice of sentencing options are discussed in relation to the findings of the British Crime Survey. In this way it is possible to offer a discussion on public sentencing preference, which utilises knowledge gained from the BCS and the research findings here, and at the same time, looks at mutual relationships between various other research projects.

### 6.2.1 Foreign research findings

#### 6.2.1.1 The public's interest/knowledge of correctional issues

The argument is often put forward that the public have little interest, and much less knowledge, of penal matters. And, furthermore, that the public as a whole, are more punitive than the courts. However, research into these areas often dispute this type of assumption. For example Gottfredson, Warner and Taylor's, (in Bottoms 1988:45) discussion of conflict and consensus concerning criminal justice in Maryland states that, "It has often been assumed that the general public is not only uninterested in correctional issues, but ignorant of these issues as well. We know from our survey that this is not the case - at least in Maryland.

We found that the vast majority of our sample are very interested in corrections and correctional issues. They are quite aware of the major problems facing the state corrections system, and they follow these issues rather regularly in the media. Finally, they hold strong opinions concerning the proper goals of a correctional system. Contrary to general belief, we found the general public not to be especially punitive - rather, they stress more utilitarian goals, such as rehabilitation, deterrence and incapacitation".

This research shows that the people of Pretoria are also very interested in penal matters and that they certainly do have a view on what "the proper goals of a correctional system" should be. However, it might be suggested that South African respondents are not as well informed as Gottfredson, Warner and Taylor's public. Whilst Gottfredson, Warner and Taylor's public are said to be less punitive than the "general belief", the people of Pretoria are very punitive in relation to what they see as the most serious (bodily harm) crimes. This punitiveness is represented by a high call for the death penalty (mostly from the White population), and long prison term sentences (mostly from the Black population) for crimes which involve the bodily harm of innocent victims. The ethics of Utilitarianism appear, as mentioned previously, to only be visible in the Pretorian public's concern for innocent victims and not in their choice of sentence. This finding may be contrary to that of the Maryland research team for two main reasons. Firstly, the South African public are historically a public who are somewhat uninformed on criminal issues like sentencing, and secondly the utilitarian goals of "rehabilitation, deterrence and incapacitation" are relatively underdeveloped in South Africa in comparison to other criminal jurisdictions.

However, both these situations are at this time undergoing a process of change in South Africa. Prompting this change has been the dramatic escalation of crime in the Republic over the past few years (more so since inception of the democratisation process), which has heightened public concern in the country and fostered public interest in criminal matters. The South African public have, as a result, become more verbal about their concern for safety, and this concern is especially visible within the area of offender punishment. Secondly, the Department of Correctional Services has made great strides in the area of rehabilitative mechanisms of punishment which will, hopefully, over the next few years, permeate the public consciousness and become regarded as a worthwhile penal goal. It is indicated herein that this appears to be what has taken place in other parts of the world.

#### **6.2.1.2 Public opinion on sentencing**

Accepting Gottfredson, Warner & Taylor's opinion on public interest and knowledge of correctional matters, and especially the proposition that the public hold strong opinions on crime in society, research from various parts of the world concerning public attitudes to

punishment and sentencing is enlightening. For example, research by van Dijk and Steinmetz (in Bottoms 1988:81) in the Netherlands concludes that "...the Dutch surveys produce results which question the common-sense theory that repressive attitudes are a pragmatic response to concern about crime... [and that]... crime causes punitiveness [on the part of the public]". Likewise, Doob and Roberts's (in Bottoms 1988:131) research in Canada indicates the inherent dangers in following what they term the "simple view" of public opinion on sentencing. They note that "[The] simple view...does not do justice to the public's actual views... [because] not only are these views based on inadequate information, but the public is, in fact, much more tolerant of leniency in sentencing (especially of non-violent offenders)". Whilst In Utah, research by Riley & Rose (1980:354) into elite's ideas on sentence reform as opposed to the public view, suggests that "Many correctional decision makers...[indicate] that they view the public as an obstacle to the implementation of various "progressive" correctional reforms...". Riley & Rose state, however, that the:

*[S]ubstituting [of] empirical data for speculative statements...suggest[s] a positive attitude on the part of the public toward 'progressive reform', in spite of the elites' strong expectation that the public is predominantly punitive rather than interested in rehabilitative goals.*

The authors also note that:

*The public has consistently been accused of being apathetic in matters of correctional reform. In fact, public apathy was viewed as a problem by the majority of elites...[but] only 5 percent of our public sample said they were not interested in reform, and nearly 80 percent indicated interest.*

This finding leads Riley & Rose to conclude that "...elites' may be ill-informed about public attitudes towards corrections.... The implication, then, is that elites' need more empirical evidence of public opinion on which to base their policy-making decisions". This type of research finding, thereby, provides a clear indication of the justifiable worth of the study to hand.

Research has tested the worth of public opinion within the criminal platform in various ways, for example in relation to differences between the punitiveness of victims as opposed to non-victims. In this respect, Ouimet and Coyle's (1991:156) Canadian research on sentencing punitiveness between public (victim/non-victim) and court practitioners states that the correlation between "...prior victimisation experience and sentencing punitiveness is fairly weak". Interestingly, the same authors are also able to use their findings to show that



"...sociodemographic variables [such] as sex, age and income are not related to the severity of sentences pronounced by the general public...[nor is]... fear... a function in the explanation of...punitiveness".

Likewise, (and very briefly here), one may note the similarities between literature reports on sentencing and seriousness. Various correlations between findings are possible, both in terms of the areas discussed above, and in terms of the seriousness scores discussed in Chapter 5. For example, that females tend to say crime is more serious than males, that the young are more lenient, that the elderly are more afraid and, therefore, more punitive (see chapter 5, section 4.5[p.135] ). The British research, to which this discussion reverts later, gives consideration to both seriousness and sentencing options, and provides the debate with an informative bridge connecting public perceptions of seriousness and punishment between the BCS and the research findings herein. However, before moving on to look in some detail at the similarities between the British and South African research on sentencing, the findings on sentencing preference of this research are presented.

It will be noted that this research emulates the British research on many fronts, for example as a method which can extend the official crime figures. This Hough and Mayhew (1983:10), indicate is an important aspect of survey research because official crime figures are only able to provide numbers for reported crimes. They state that "... For...categories for which comparison was possible, the [BCS] survey[s] indicated a considerably greater number of incidents than did [official/reported] criminal statistics". The authors further indicate that various reasons exist by which to account for this dark figure of crime but that "...the most important implication... is that it demonstrates the scope for error when relying exclusively on statistics of recorded offences as an index of the volume and nature of crime" (1983:13).

Also, and perhaps of more import to the work at hand, is Hough and Mayhew's (1983:33) suggestion that "The real message of the BCS is that it calls into question assumptions about crime upon which people's concern is founded...". This "message" highlights one of the most positive areas of survey research into crime and justifies the study call for inclusion of the South African public's wishes within criminal policy in the country.

Still more justification for public inclusion comes with the possibility of using survey data to provide a scale of sentence options. In this respect Pease (1988:34) suggests that "An obstacle to understanding sentencing has been the want of a scale of sentence severity....The BCS offers an opportunity to link data on offence seriousness with the scaling of sentence severity". Therefore, in this chapter an effort is made to correlate sentence preference and in Chapter 7 to follow, an attempt is made to provide a South African "guide" to sentence

severity utilising respondent response. The percentage sentences recorded by South African respondents are hereunder discussed in relation to each crime, after which, the chapter moves on to examine sentence trends in relation to seriousness scores.

### **6.3 SENTENCING PREFERENCE: an overview of the South African research findings**

It is necessary to offer a brief word of explanation concerning the sentencing option percentages which follow. Percentage differentials in some cases appear to be large, but respondent numbers within some categories are relatively small. Therefore, percentage differentials within categories should be considered as trend indicators rather than statistically significant, and should, therefore, be treated with relative caution. In this section, where reference is made to seriousness ranking, Table 5.8 in Chapter 5 [p.146] which provides ranks according to percentage of respondents classifying crimes as serious/very serious, should be consulted.

#### **6.3.1 The general nature crimes**

Looking at the general nature crimes (Section B of the questionnaire: crimes B1-B11), recording at this stage only respondent sentence choice (frequency) for each particular crime, provides the following information on South African respondent sentence preference.

##### **6.3.1.1 Someone being mugged and robbed**

Overall approximately 75 percent of respondents selected a prison sentence, whilst 7 percent specified a prison sentence and/or correctional supervision. Highlights between categories advising imprisonment, show that the length of prison term recommended ranged from less than 2 years (28%) to more than 15 years, with 31 percent indicating 2-5 years and 12 percent indicating 6-14 years. Those most in favour of prison were noted to include the Black group, males, the older age group, the less qualified, those more anxious/fearful of crime and those wishing to have an input into sentencing.

##### **6.3.1.2 A woman being sexually molested and pestered**

Overall approximately 64 percent of respondents recommend a prison term for this crime although sentence preferences were slightly more varied and more diversified across the whole spectrum of sentence options. For example 8 percent of respondents advised the death sentence, 9 percent of respondents advised the suspended sentence and 4 percent chose a prison term and/or correctional supervision. Highlights between categories advising imprisonment show that 13 percent indicated less than 2 years, approximately 11 percent indicated 2-3 years, 13 percent indicated 4-5 years and 17 percent indicated imprisonment of between 6-14 years. Those most in favour of prison were notably the Black group, the very young and the more qualified.

#### **6.3.1.3 Someone being attacked by strangers**

Overall approximately 69 percent of respondents recommend a prison term for this crime whilst 8 percent advised a prison sentence and/or correctional supervision. Highlights between categories advising imprisonment show that approximately 16 percent indicated less than 1 year, 12 percent indicated 1-2 years, approximately 17 percent indicated 2-3 years, 13 percent indicated 4-5 years whilst 13 percent indicated more than a 5 year term and 9 percent recommended the suspended sentence. Those most in favour of prison were shown to be the Black group, males, the least qualified and those who did not want an input into sentencing.

#### **6.3.1.4 A home being broken into and something stolen**

Here again, approximately 73 percent of respondents recommend a prison term. Highlights between categories advising imprisonment show that 22 percent indicated less than 2 years, 34 percent indicated a prison term of between 2-5 years and 17 percent indicated more than a 5 year term. Those most in favour of prison were noted to be the Black group, males, the older age group, the least qualified, the most anxious/fearful of crime and, those who do not want an input into sentencing.

#### **6.3.1.5 A car being stolen for a joyride**

Overall approximately 39 percent of respondents recommend a prison sentence with 9 percent advising a prison sentence and/or correctional supervision. Diversity of choice is more apparent and sentence preferences include 17 percent indicating whipping, 11 percent indicating periodic imprisonment and 10 percent a fine. The suspended sentence was recommended by 11 percent of respondents. Those most in favour of imprisonment were overwhelmingly noted to be the Black group (as opposed to Whites, nearly half of whom indicate other sentences [including whipping]), with males, the youngest age group and those who did not want an input into sentencing following closely behind.

#### **6.3.1.6 Someone smoking cannabis or marijuana (dagga)**

Sentence response for this crime is spread lightly between all sentence options. Highlights between categories show that approximately 30 percent indicated the institutional option (rehabilitative) whilst 32 percent indicated a prison term, and 17 percent indicated prison and/or correctional supervision. Those most in favour of imprisonment were shown to be the Black group and those respondents who recorded in the not anxious/fearful of crime category. This is an interesting result which is assessed further when consideration is given to the crime of selling/pushing drugs at 3.4.8., and in section 6.2 on decriminalisation hereunder. It is also of interest to note that in section 6.2 respondents are shown to call for the retention of drug related offences as a culpable crime. This result might be said to add credence to the idea

proffered elsewhere that the public appear to look more lightly upon offences which function through autonomous choice (to smoke dagga) rather than crimes which involve innocent victims (to sell/push drugs).

#### **6.3.1.7 Someone fiddling their income tax**

Here, overall, the majority of responses are divided between a prison term (43%) and the fine (39%). The Black group, males and the youngest age group mostly indicated imprisonment whilst Whites, females, the most qualified and the oldest age group indicated a fine. The amount of fine recommended was primarily in excess of R500.

#### **6.3.1.8 Someone being insulted or battered (bothered) by strangers, but not in a serious way**

Respondent sentence choice was very diversified for this crime. Highlights between categories show that 19 percent indicated a fine, 17 percent indicated the suspended sentence and 8 percent chose prison and/or correctional supervision. Whipping also appears to be a popular sentence for this crime at 7 percent. 40 percent of respondents indicated the prison option, an option once again overwhelmingly favoured by the Black group, and to a somewhat lesser extent, the less qualified, the youngest age group, those not anxious/fearful of crime and those not wishing to have an input into sentencing. The diversification may be a result of the question wording with some focusing on "insult" and others on "battered", which have very different connotations.

#### **6.3.1.9 A prostitute soliciting for trade**

Here sentence choice is evenly spread amongst imprisonment, imprisonment and/or correctional supervision, and the fine. Highlights between categories show that 31 percent indicated a prison term (mostly in the 1-5 year bracket), 24 percent indicated a fine (mostly in excess of R100), 14 percent indicated a prison term and/or correctional supervision, 12 percent chose the institutional option and approximately 10 percent the suspended sentence. Overall, it appeared that Whites and males preferred the fine whilst Blacks and the less qualified preferred imprisonment. Later, in section 6.1, it is indicated that the South African public record high percentage scores for the retention of prostitution as a culpable crime and the comparatively harsh sentences recorded here confirm that recommendation .

#### **6.3.1.10 Stealing R10 worth of goods from a shop**

This crime appears harshly sentenced by the survey population as a whole (considering the low seriousness score of 52 percent [Table 5.8, Chapter 5, p.146]) and diversity of choice makes it difficult to pick up category trends. As a generalisation, the Black group again indicated a preference for imprisonment and the White group, the fine. Highlights between

categories show that 29 percent indicated a fine mostly in excess of R50, 26 percent indicated a prison term mostly less than 5 years), 17 percent indicated the suspended sentence, 8 percent indicated a prison terms and/or correctional supervision and 11 percent indicated whipping.

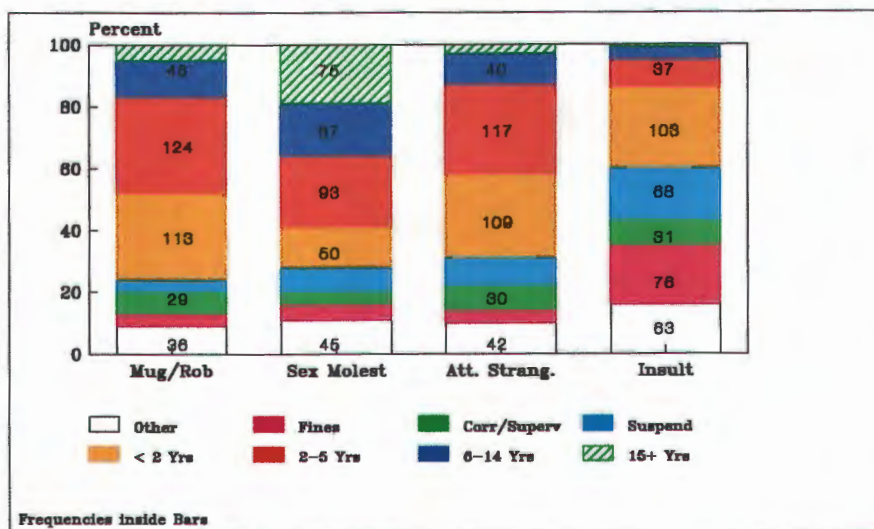
#### 6.3.1.11 Stealing R100 worth of goods from a shop

Here a similar trend to the stealing of R10 worth of goods from a shop is noted with diversity of choice making it difficult to identify trends. However, generally, it would appear that Coloureds, Blacks and the least qualified preferred the prison option whilst Whites again preferred the fine with the older age group preferring imprisonment and/or a fine. Highlights between categories show that approximately 37 percent indicated a prison term (mostly less than 5 years), 32 percent indicated a fine (mostly in excess of R100) and 12 percent indicated the suspended sentence.

#### 6.3.2 Summary of sentence preference: the general nature crimes

As a summation of the sentencing preference of respondents to the general nature crimes it can be stated that the designated bodily (personal) harm crimes of being mugged and robbed, sexually molested or attacked by strangers, finds in each case that at least 60 percent of respondents indicated imprisonment. This is a surprising result because the crimes denoted are somewhat non-specific. Consequently there is no way of telling just how much of an influence question wording and position within the questionnaire affected respondent's response, but something of a link is forged later in this chapter when seriousness is correlated with sentence preference. As perceived seriousness decreases (Table 5.9, Chapter 5, [p.152]), so too does sentence severity reflected by harsher sentences. Figure 6.1 below shows for instance how the crimes of sexual molestation or mugged and robbed attract longer prison terms compared to the crimes of attack by stranger and insult.

**Figure 6.1: recommended sentences - mugged & robbed, sexual molestation, attack by strangers, insulted**





Considering the crimes in this general nature section which do not denote what can be termed a first person victim, for example prostitution (figure 6.2 hereunder), it is apparent that less than 50 percent of respondents indicate a prison term and less harsh sentences appear overall more popular. Figure 6.2 shows more lenient sentences with fines more popular for the crime of fiddling tax, whilst in relation to those crimes which refer to what one can term a form of self harm (for example smoking of drugs - a choice factor), one can suggest that the institutional type of sentence (rehabilitative) finds favour with respondents.

**Figure 6.2: recommended sentences - smoke dagga, fiddle tax, prostitution**

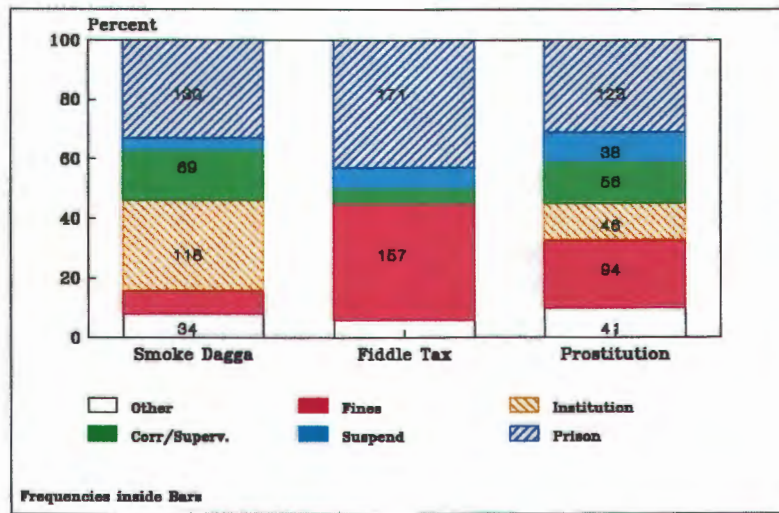
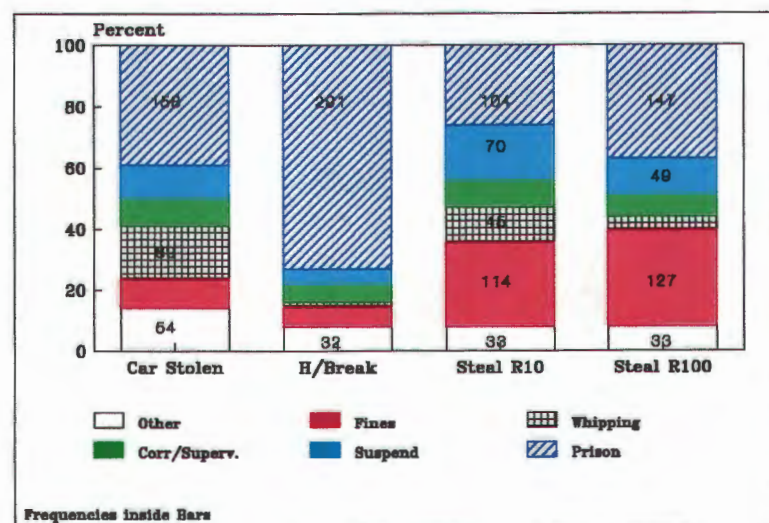


Figure 6.3 hereunder shows that whipping appears popular with respondents for the less damaging type of offence, for example the stealing of a car for a joyride whilst fines are preferred for the stealing of goods from a shop. Here it is noted that overall, prison plays a less important role with the role of the fine increasing as the type of theft becomes less serious.

**Figure 6.3: recommended sentences: car stolen, housebreaking, stealing R10, stealing R100**



Overall, for the 11 general nature crimes it seems that Blacks consistently indicate a prison term and, likewise, more often than not, the youngest and least qualified groups. The fine appears to be the preference of the White group and to a lesser extent, of older respondents. One way of viewing these results might be to suggest that imprisonment is the more traditional sentence and that traditional forms of punishment appeal more to the less knowledgeable (not least educated) or experienced respondent. Conversely one might argue that the more experienced, knowledgeable or perhaps even cynical respondent, believes that prison does not work, and this attitude prompts them to give consideration to different sentence options.

Looking at the 1984 British Crime Survey, one can only corroborate these results to some degree. Unfortunately, Pease (1988) does not correlate sentence preference with categories of respondents - i.e to race, age etcetera - simply choosing to distinguish sub-divisions in relation to seriousness scores. Remembering again the warning on the use of different methodologies (see Chapter 5, section 6.2, [p.147], to which one should add the differing cultural influences of the British and South African survey populations)], it can be stated that imprisonment is highly regarded as a punishment for the serious/very serious type of crimes. In this context Pease (1988:41) says that "... [for] crimes of a higher seriousness, prison is more often chosen as the proper response to serious personal offences than to property offences....[and], [A] general picture emerge[s] in which custodial sentences [are] seen as appropriate for the offences rate[d] as the most serious, and no action or warnings for those rated the least serious.... Suspended sentences of imprisonment were consistently judged the most serious of the options other than active custody" (1988:44). Therefore, at this stage, one can say that imprisonment appears to be seen by both the British and South African respondent as a relevant (perhaps traditional) form of punishment for serious criminal acts.

As a point of interest, Kapardis & Farrington (1981:108), conducting research into an experimental study of sentencing by magistrates, note that magistrates, unlike the public, appear to favour the other sentences over imprisonment. They say:

*...the 1979 statistics (Home Office, 1980) show that for persons aged 21 or over found guilty of the more serious (indictable, nonmotoring) offences, the most frequent disposals were as follows: fine 60,3% conditional discharge 10,0%, suspended imprisonment 8,4%, immediate imprisonment 7,4%, probation 7.0%, and bound over (agreeing to observe certain conditions) 0.7%.*

They also indicate that males appear to receive relatively more severe sentences than females, but condition their notation with the warning that, "Of course, it cannot be

concluded...that, other things being equal, magistrates give more severe sentences to males than to females. There are many uncontrolled variables confounded with sex". (More of Kapardis & Farrington's remarks concerning mitigating factors are taken up in section 5.1 to follow.)

### **6.3.3 The specific nature Crimes**

Looking at the specific nature crimes (Section B of the questionnaire: crimes B12-B22), at this stage recording only respondent sentence choice (frequency) for each particular crime, provides the following information on South African respondent sentence preference.

#### **6.3.3.1 Someone murders another**

The majority of respondents dealt harshly with the crime of murder by selecting sentences from the first two sentence categories. For example, highlights between categories showed that 56 percent called for the death sentence and 41 percent called for imprisonment (mostly exceeding a term of 10 years). This response to deliberate murder supports the seriousness score of 98% registering serious/very serious (Table 5.8, Chapter 5 [p.146]. Whites mostly favoured the death penalty (89%), compared to less than 40 percent of Blacks and Coloureds.

##### **6.3.3.1.1 Personal knowledge - someone murders another**

The crime of murder offered a sub-response category on personal knowledge in order to ascertain if sentence choice was affected by a personal involvement. Respondents were asked to indicate if the victimisation of one of the following had affected their choice of sentence: 1) a close friend, 2) a family member, 3) an acquaintance, 4) other, 5) none of these. Thereby, when asked if response preference was influenced by a personal knowledge of the crime, 68 percent of respondents answered "no". It can, therefore, be argued that whilst personal knowledge of the crime of murder has little bearing on respondent response, overall perceived seriousness is supported.

#### **6.3.3.2 Someone guilty of the crime of manslaughter**

Here, (as with the seriousness scores: Table 5.8, Chapter 5 [p.146] respondents score this crime with more leniency than in the case of murder - perhaps influenced by the unintentionality of the crime. Highlights between categories show that overall approximately 52 percent of respondents selected a prison sentence (rather than the death penalty), 10 percent recommended a 20+ year term, 12 percent a 10-19 year term and, 30 percent up to a 10 year prison term. 13 percent of respondents indicated the death penalty and 20 percent the suspended sentence. An interesting finding emerged in relation to this crime in that 33 percent of Blacks indicated the death penalty (similar to their verdict for murder). More of the



most qualified recommended the death penalty. Coloureds and Asians appeared to favour the imprisonment option, as did more of the most anxious/fearful of crime group, whilst, overall, more Whites than other groups were in favour of the suspended sentence.

#### **6.3.3.3 The rape of someone**

Overall approximately 70 percent of respondents selected a prison sentence for this crime and 24 percent specified the death sentence, reflecting the 99% response classification as serious/very serious on the seriousness ranking table (Table 5.8, Chapter 5 [p.146]). Highlights between categories show that of those respondents indicating a prison term, approximately 39 percent recommended a term of more than 10 years, 15 percent recommended a term of between 6-9 years and the remainder, less than 5 years. More Whites, Asians, the more qualified and those wanting an input into sentencing, indicated the death sentence, but interestingly, no significant difference is noted between males and females.

##### **6.3.3.3.1 Personal knowledge - the rape of someone**

As with the crime of murder, a sub-response concerning personal knowledge on the rape of someone was included. Overall, 79 percent of respondents answered "no". It can, therefore, be suggested with some conviction, that even when personal knowledge of the crime of rape is absent, respondents perceived the crime to be serious enough to call for the imposition of a harsh sentence.

#### **6.3.3.4 The act of terrorism**

This crime was dealt with harshly by respondents with highlights showing that approximately 58 percent recommended imprisonment with 40 percent favouring an imprisonment term of 10 years or more. 35 percent of respondents indicated the death sentence, this figure mostly emanating from the White group.

#### **6.3.3.5 Someone acts fraudulently**

Overall, 56 percent of respondents recommended a prison sentence for this crime. Highlights indicate that 26 percent specify a fine and 7 percent indicate the suspended sentence. More Blacks and Asians indicated the imprisonment option.

#### **6.3.3.6 An act of corruption**

Highlights between categories for the crime of corruption show that 51 percent of respondents recommended a prison term of mostly 5 years or less and 29 percent indicated a fine. Blacks, males and the no-input into sentencing group suggested imprisonment the most. 25 percent

suggested a fine of R600 or more, and Coloureds recommended the fine option more than other race groups. 10 percent of respondents indicated the suspended sentence.

#### **6.3.3.7 Political intimidation**

Highlights between categories for the crime of political intimidation show that 53 percent recommended imprisonment, 16 percent indicated a fine, and 17 percent suggested the suspended sentence. 37 percent suggest a term of 5 years imprisonment or less. Blacks, the younger age group and the no input into sentencing group appear to favour a prison term, and more Asians indicated a fine, 10 percent suggesting a fine of R600 or more.

#### **6.3.3.8 The selling of illegal drugs**

The selling of illegal drugs reflects respondents' concern with relatively harsh sentence choices recorded, supporting the 4th rank position on the overall seriousness ranking table (Table 5.8, Chapter 5 [p.146]). Highlights show that overall approximately 73 percent of respondents recommended imprisonment for this crime and 14 percent indicated the death penalty. 17 percent indicated a 20 year or more term, 21 percent a 10-19 year term and more than 16 percent, a 6-9 year term and Coloureds appeared to favour imprisonment. More Whites and Asians recommended the death penalty and, likewise, more of those who wished to have an input into sentencing. Harsh sentencing may have something to do with the emotive crime situation offered for this crime which involved "the deception (for monetary gain) of a young child".

#### **6.3.3.9 An offence of assault and robbery**

This crime is dealt with harshly by respondents in terms of imprisonment. Highlights indicate that approximately 79 percent of respondents overall selected a prison term. It was noted that more than 76 percent of each race group (80 percent of Whites and Blacks), the younger age group, the least qualified and the no input into sentencing group favoured this sentence option.

#### **6.3.3.10 Driving a motor vehicle whilst over the legal alcohol limit**

Respondent sentence options for this crime were spread throughout the sentence options. However, overall, the prison sentence is the majority choice with approximately 36 percent indicating this option, 6 percent specified prison term and/or correctional supervision and 22 percent indicated a fine. Highlights show that 29 percent suggested a prison term of less than 10 years. In respect of the fine, 14 percent recommended an amount of more than R600. Also recorded is an 11 percent response for the suspended sentence, 11 percent for periodical imprisonment and 12 percent for institutional correction, which recommendations might be suggested to show respondent concern with the concept of rehabilitation. The

largest groups recommending imprisonment were shown to be the Asian and Black groups and the no input into sentencing group.

#### **6.3.3.11 Driving a motor vehicle whilst over the legal alcohol level causing the death of an innocent victim**

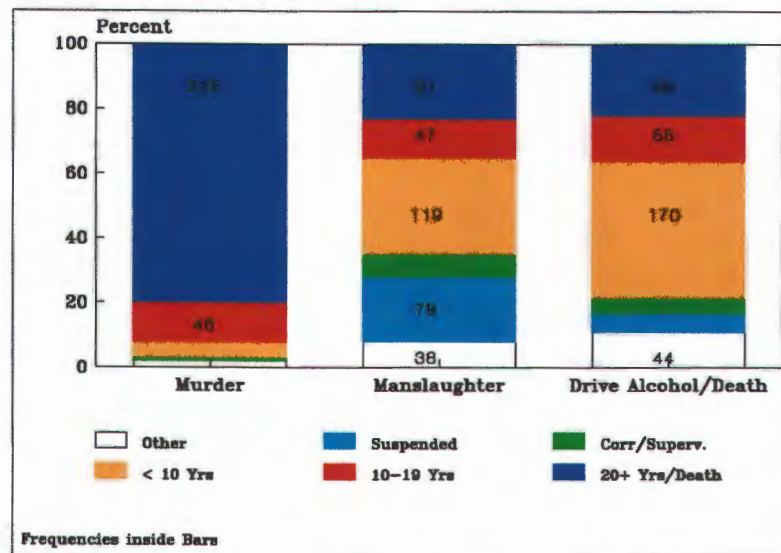
Sentencing choice here clearly denotes respondent concern with crimes of bodily harm involving innocent victims. Unlike the lesser crime of driving a motor vehicle whilst over the legal alcohol level (without the death of an innocent victim), responses are concentrated in the harsher imprisonment options rather than "spread throughout sentence options". Highlights show that overall approximately 65 percent indicated a prison sentence and 14 percent specified the death penalty for this crime. The Coloured group were shown to favour the prison option the least of all four race groups.

#### **6.3.4 Summary of sentence preference: the specific nature crimes**

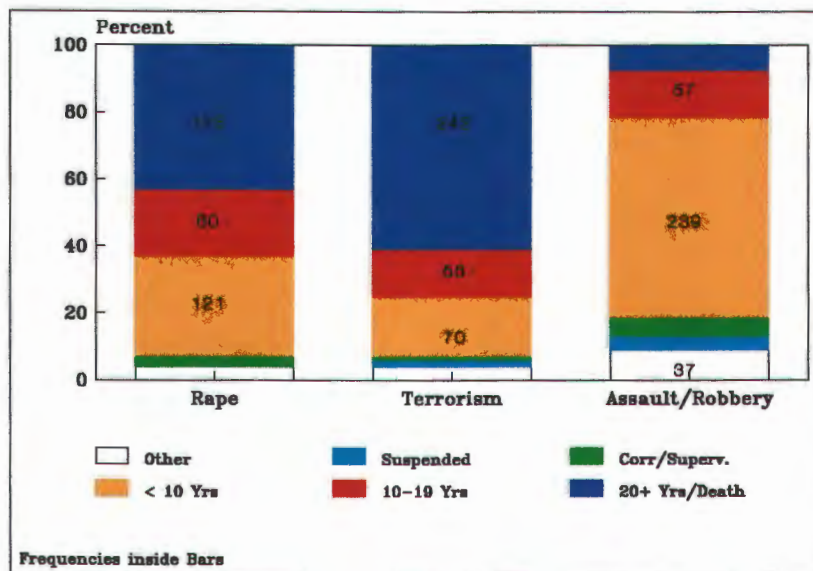
Looking at the specific nature crimes, much of what was proposed in section 3.3 above as reasons for choice can be repeated, certainly in terms of the reference made to Childs (1965), Doob & Roberts (1988) and Pease (1988), but in reverse: that specificity may have had a contrary influence upon sentence preference. Blacks again appeared consistently to favour the imprisonment option as did the youngest age group, the least qualified and the no input into sentencing groups. Whites often recommended the death penalty more. Adding to the earlier suggestion that those who choose the traditional sentence of imprisonment might be less knowledgeable or less experienced (see section 3.3 above) and, thereby, more conventional, one might also suggest unimaginativeness in the same terms, i.e. that imprisonment springs automatically to mind, and is rarely re-considered. As was suggested earlier, there is actually no way of telling what prompts choice of sentence preference, but trends appear correctional in summation of both the general and specific nature crimes. For example one might suggest that Blacks, the young, the less qualified and the no wish for input into sentencing groups are the most punitive and that complementary trends are apparent within the remainder. It can also be suggested that the rehabilitative punishment options, for example the fine and institutional correction, are, by and large, less favoured by respondents overall.

Looking at Figures 6.4, 6.5 and 6.6 hereunder, it is apparent that obviously fatal crimes attract harsh sentences (but less so with the non-premeditated type). As degrees of violation/susceptibility increase, sentences become more severe, as is seen by noting the increasing severity from assault/robbery through to murder and severity for rape and terrorism compared to manslaughter and drink/drive/death. The public type crimes are seen to attract a variety of sentences with the fine becoming more popular overall.

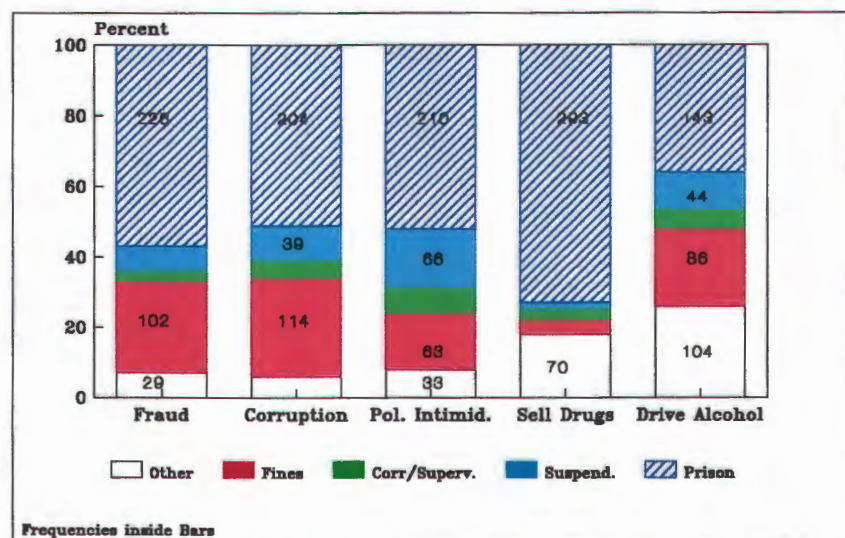
**Figure 6.4: common sentences for fatal crimes: specific nature**



**Figure 6.5: common sentences for non fatal crimes: specific nature**



**Figure 6.6: common sentences for public crimes: specific nature**



## **6.4 RESPONDENT SENTENCING PREFERENCE: the sub-divided categories**

Taking the sub-divided categories of bodily harm, secondary harm and property crimes - first outlined in Chapter 5, section 6.4 [p.151] - consideration is now given to sentencing patterns within these categories. It is noted that there do appear to be trends of sentence severity as reflected by the mean seriousness scores presented previously in table 5.9, Chapter 5 [p.151].

### **6.4.1 The bodily harm crimes**

With 400 respondents sentencing each of the 10 bodily harm crimes there is a possibility of 4000 (3994 actual) possible sentences divided amongst the twenty three sentence categories. The pattern of sentencing for the bodily harm crimes is provided in Table 6.1. Also shown in Table 6.1 are the mean seriousness scores for those selecting each sentence over all 10 crimes.

Of note is the public's relatively high call for the death penalty and for long prison terms, and the somewhat low call for the sentence of a fine. These findings appear to uphold the proposition elsewhere herein that respondents are extremely concerned with physical victim harm. Confirmation of respondent concern is provided in the harsh choice of sentence, and this result is, in turn, correlational with respondent seriousness scores for crimes which involve victim harm.

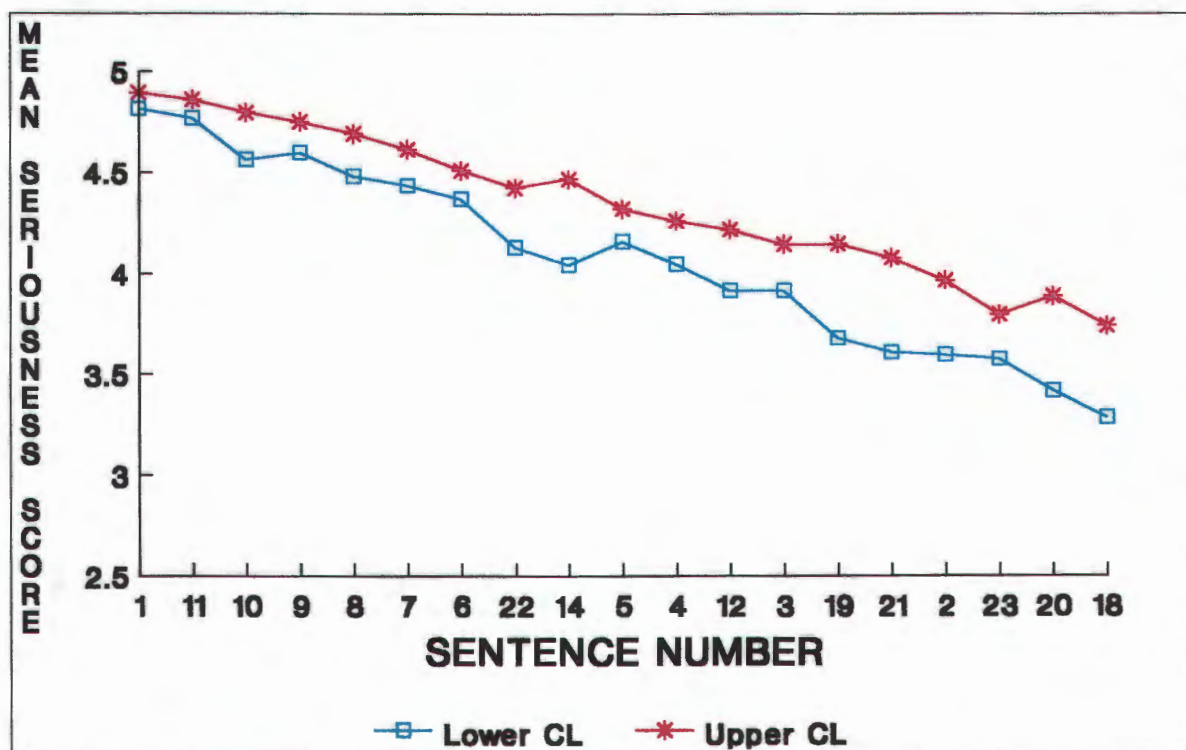
Looking in more detail at the particular penalties and their corresponding mean seriousness scores overall, the bodily harm crimes appear to receive a penalty which reflect perceptions of seriousness. In this respect, Table 6.1 and figure 6.7 show clearly that mean seriousness scores decrease as sentences become less harsh (thereby confirming the public's conception of crime seriousness in terms of harsher sentence), and that scores are significantly different over the range of sentences.

**Table 6.1 - sentencing preferences for bodily (personal) harm crimes**

RANK	SENTENCE NUMBER	SENTENCE	MEAN SER. SCORE	Choosing Sentence of 3994	
				%	No.
1	1	Death	4.85	15.2	609
2	11	Prison : 20+ years	4.81	10.6	422
3	10	Prison : 15-19 years	4.68	3.7	147
4	9	Prison : 10-14 years	4.68	6.9	274
5	8	Prison : 8-9 years	4.59	4.1	162
6	7	Prison : 6-7 years	4.52	5.2	206
7	6	Prison : 4-5 years	4.43	9.6	385
8	22	Superv. Imprisonment	4.28	3	119
9	14	Institutional	4.26	2	78
10	5	Prison : 2-3 years	4.24	9.2	368
11	4	Prison : 1-2 years	4.15	4.7	188
12	12	Periodical Impris.	4.07	3.7	148
13	3	Prison : 6-11 months	4.03	4.8	190
14	19	Fine : R600 +	3.91	1.8	70
15	21	Correctional Superv.	3.84	1.9	77
16	2	Prison : 0-5 months	3.78	2.5	101
17	23	Suspended Sentence	3.69	7	281
18	20	Whipping	3.66	1.4	55
19	18	Fine : R100-500	3.5	1.8	72
		Others		1.1	42
Total No. of Sentences					3,994



**Figure 6.7 - 95% confidence limits (CL) of mean seriousness scores of sentences for 10 bodily (personal) harm crimes**

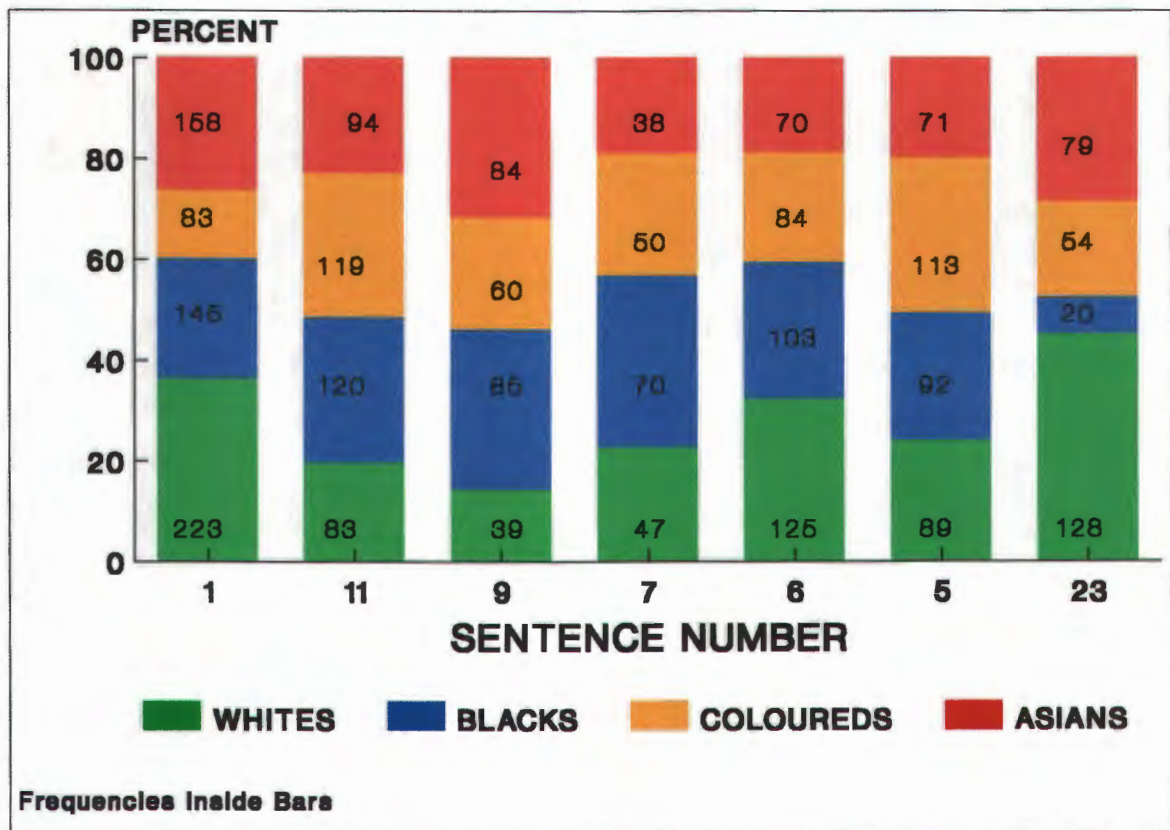


Hereunder the 7 penalties chosen most by respondents, which gained 5% or more (see Table 6.1) of the possible 4000 selections, are focused upon. The 7 sentences chosen most by respondents for the bodily harm crimes were:

- sentence number 1, the death penalty
- sentence number 11, prison: 20+ years
- sentence number 9, prison: 10-14 years
- sentence number 7, prison: 6-7 years
- sentence number 6, prison: 4-5 years
- sentence number 5, prison: 2-3 years
- sentence number 23, suspended sentence

Figure 6.8 illustrates racial differences for these 7 sentences and reflects seriousness scores, wherein, it is noted that more Whites prefer the death sentence and more Asians and Blacks prefer imprisonment. It can be noted that although Coloureds record harsh seriousness scores, less selected the death sentence in favour of longer prison terms. Almost half of those selecting the suspended sentence were White. Few gender differences were apparent in respect of sentence choice.

**Figure 6.8: most commonly chosen sentences by race for bodily (personal) harm crimes**



Endnote 1 provides pie chart representation of the 7 sentences chosen most by respondents. Each chart shows, for that particular sentence, the distribution of responses over various crimes. For example, Table 6.1 shows that 609 of all sentencing preferences were given to sentence number 1, the death penalty. Among these 609, 222 (36%) were allocated for the crime of murder.

#### **6.4.1.1 Sentence number 1 - the death penalty**

Referring now to the pie charts in Endnote 1 (sections 4.1.1 - 4.1.7 herein) it is noted that the death penalty was recommended by respondents for the crime of murder (36%), the crime of terrorism (23%) and the crime of rape (16%). A full 90 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.85 (Table 6.1). Looking at the sub-category of race (figure 6.8), it is noted that Whites were the most likely group to choose the death penalty and Coloureds the least.

#### **6.4.1.2 Sentence number 11 - prison sentence of 20-30 years**

The 20-30 year imprisonment option was recommended by respondents for the crimes of murder (23%), terrorism (24%), manslaughter (10%) and rape (18%). A full 84 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of



4.81 (Table 6.1). Looking at the sub-category of race (figure 6.8), it is noted that Blacks and Coloureds, each at 29 percent, are slightly more likely than Whites and Asians to choose this sentence. The 20-30 year sentence is the only one of the popular sentences showing gender differences: males recording as less likely than females to choose a long prison term.

#### **6.4.1.3 Sentence number 9 - prison sentence of 10-14 years**

The 10-14 year imprisonment option was recommended by respondents for the crimes of rape (19%), drink/drive/death (15%), assault (14%), murder and manslaughter (11% respectively) and terrorism (10%). A full 71 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.68 (Table 6.1). Looking at the sub-category of race (figure 6.8) it is noted that fewer Whites and more Blacks and Asians chose this sentence option.

#### **6.4.1.4 Sentence number 7 - prison sentence of 6-7 years**

The 6-7 year imprisonment option was recommended by respondents for the crimes of assault (17%), rape (16%), manslaughter (15%). 60 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.52 (Table 6.1). Looking at the sub-category of race (figure 6.8) one sees that more Blacks and few Asians choose this sentence option.

#### **6.4.1.5 Sentence number 6 - prison sentence of 4-5 years**

The 4-5 year imprisonment option was recommended by respondents for the crimes of assault (17%), drink/drive/death (15%), sexual molestation and attack by strangers (13% respectively) rape and mugged and robbed (12% each respectively) and manslaughter (9%). 54 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.43 (Table 6.1). Looking at the sub-category of race shows that more Whites and slightly less Asians favoured this sentence option (figure 6.8).

#### **6.4.1.6 Sentence number 5 - prison sentence of 2-3 years**

The 2-3 year imprisonment option was recommended by respondents for the crimes of mugged and robbed (21%), assault (19%), attacked by strangers (18%), sexual molestation (11%) and drive/drunk/death (10%). 40 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.24 (Table 6.1). Looking at the sub-category of race indicates that Coloureds favour this sentence option more than other groups (figure 6.8).

#### **6.4.1.7 Sentence number 23 - the suspended sentence**

The suspended sentence option was recommended by respondents for the crimes of manslaughter (28%), insulted by strangers (24%), attacked by strangers (13%) and sexual molestation (12%). 19 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.69 (Table 6.1). Looking at the sub-category of race shows that Whites far exceeded the other three race groups in this choice of sentence. (figure 6.8).

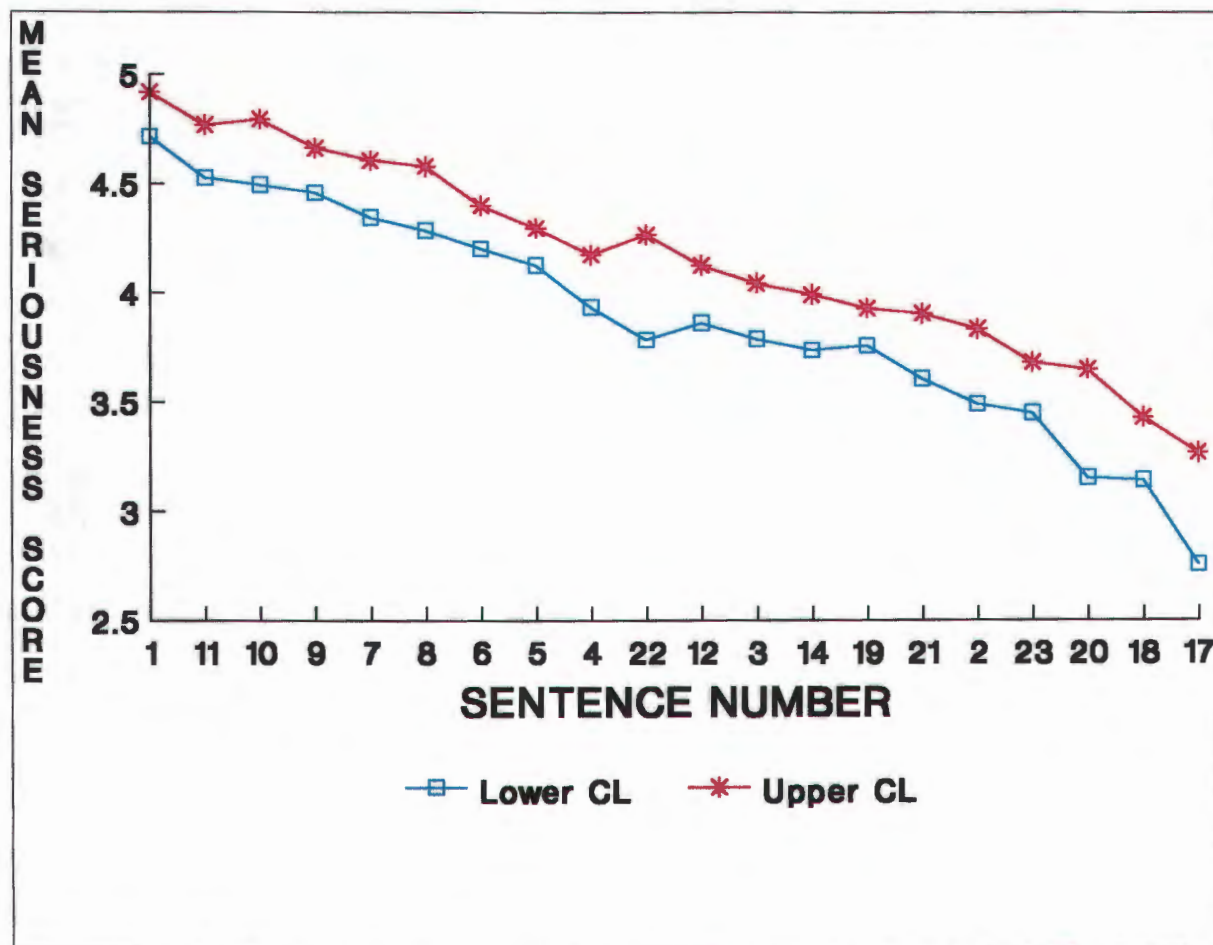
#### **6.4.2 The secondary harm crimes**

With 400 respondents sentencing each of the 10 secondary harm crimes there is again a possibility of 4000 (3996 actual) possible sentences divided amongst the 23 sentence categories. The primary pattern of sentencing for the secondary harm crimes is provided in Table 6.2 together with mean seriousness scores. Sentences were much more diversified in comparison with the bodily harm crimes, but again it is noted that as victim harm decreases, so does severity of sentence choice. Table 6.2 and figure 6.9 once again clearly show sentence harshness decreasing with mean seriousness score in relation to secondary harm crimes.

**Table 6.2 - sentencing preferences for secondary harm crimes**

RANK	SENTENCE NUMBER	SENTENCE	MEAN SER. SCORE	Choosing sentences of 3996	
				%	No.
1	1	Death	4.82	1.9	76
2	11	Prison : 20+ years	4.65	3	119
3	10	Prison : 15-19 years	4.65	1.6	62
4	9	Prison : 10-14 years	4.56	4.6	182
5	7	Prison : 6-7 years	4.48	3.1	122
6	8	Prison : 8-9 years	4.43	3	118
7	6	Prison : 4-5 years	4.3	7.2	288
8	5	Prison : 2-3 years	4.21	7.7	307
9	4	Prison : 1-2 years	4.06	5	198
10	22	Superv. Imprisonment	4.03	2	81
11	12	Periodical Impris.	4	4.8	192
12	3	Prison : 6-11 months	3.92	5.1	204
13	14	Institutional	3.87	6	238
14	19	Fine : R600 +	3.84	11.5	460
15	21	Correctional Superv.	3.76	5.5	219
16	2	Prison : 0-5 months	3.66	3.8	151
17	23	Suspended Sentence	3.57	9.7	387
18	20	Whipping	3.4	2.6	102
19	18	Fine : R100-500	3.29	7.3	291
20	17	Fine : R50-99	3.01	2.3	90
		Others		2.7	109
Total No. of Sentences					3,996

**Figure 6.9 - 95% confidence limits (CL) of mean seriousness scores of sentences for secondary harm crimes**



Some contradictions are, however, apparent, for example imprisonment of 6-7 years has a higher seriousness score than imprisonment of 8-9 years, but figure 6.9 shows their confidence intervals to be very nearly identical. Again it can be said that these sentences differ considerably in relation to those for the 10 bodily harm crimes, both in mean seriousness scores and in type of sentence. This reiterates the suggestion already made elsewhere, that the South African respondents appear to hold a view of criminal occurrence which can be likened to other findings of seriousness/severity, in their concern for victim harm.

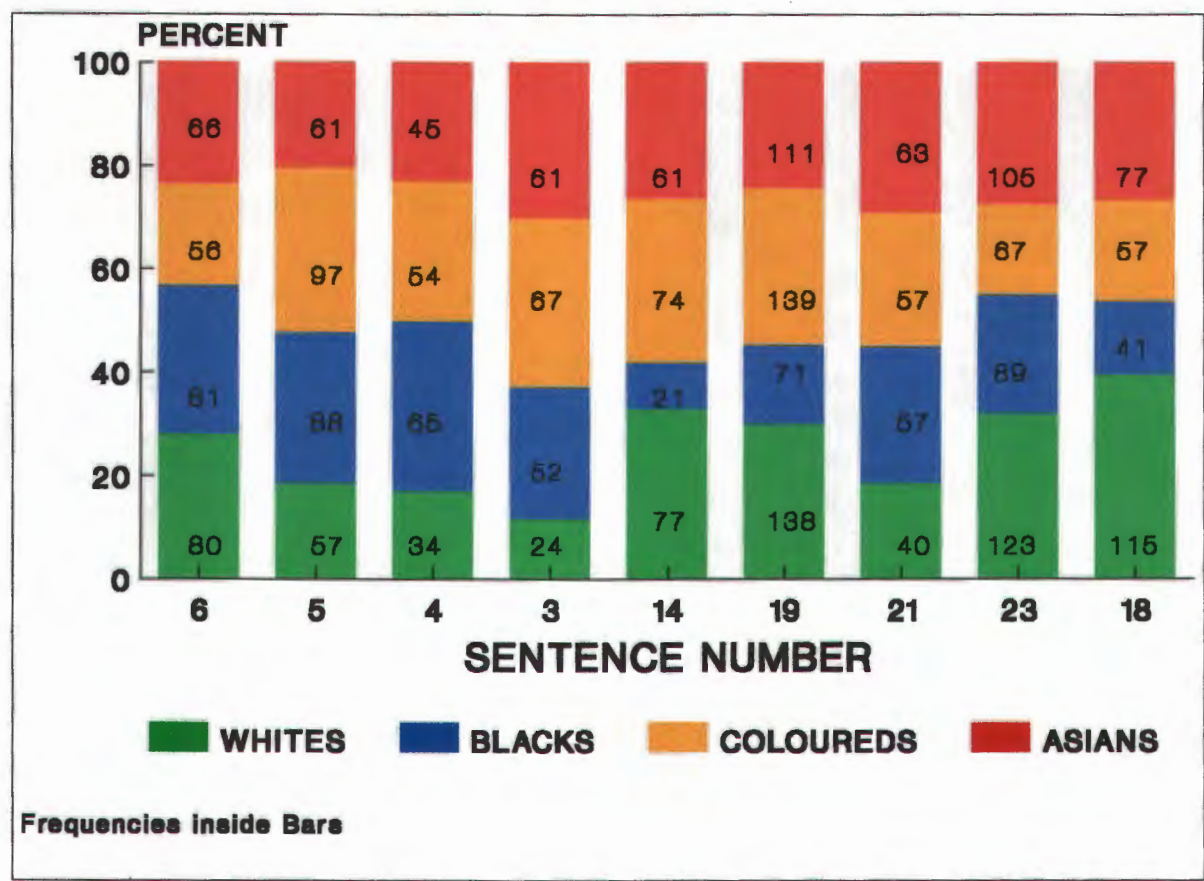
The death sentence was recommended mainly for the crime of selling drugs, which although it is here classified as a secondary harm crime (providing a choice), occupies rank 4 on the overall seriousness ranking table (see Chapter 5 Table 5.8 [p.146]) and reflects, it can be argued, an apparent concern by respondents for "innocents" within society.

Again, considering sentences chosen most by respondents, those gaining 5% or more of the possible 4000 selections (Table 6.2), the 9 most chosen sentences for the secondary harm crimes were:

- sentence number 6, prison: 4-5 years
- sentence number 5, prison: 2-3 years
- sentence number 4, prison: 1-2 years
- sentence number 3, prison: 6-11 months
- sentence number 14, committal to an institution
- sentence number 19, fine of R600+
- sentence number 21, correctional supervision
- sentence number 23, suspended sentence
- sentence number 18, fine of R100-500

Figure 6.10 indicates racial differences with Asians and Blacks imposing harsher prison sentences and Whites recommending fines and institutional correction.

Figure 6.10 - most commonly chosen sentences by race for secondary harm crimes





Once again, the 9 most commonly chosen sentences are shown in pie chart format as Endnote 1. Each chart shows, for that particular sentence, the distribution of responses over various crimes. For example, Table 6.2 shows that 288 of all sentencing preferences were given to sentence number 6, 4-5 years imprisonment. Among these 288, 51 (18%) were allocated for the crime of fraud.

#### **6.4.2.1 Sentence number 6 - prison sentence of 4-5 years**

Referring now to the pie charts in Endnote 1 (sections 4.2.1 - 4.2.9 herein), it is noted that the 4-5 year imprisonment sentence was recommended by respondents for the crimes of fraud (18%), selling drugs and corruption (16% each respectively) political intimidation (12%) and fiddling income tax (11%). 50 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.30 (Table 6.2). Looking at the sub-category of race, Blacks chose this sentence the most (figure 6.10).

#### **6.4.2.2 Sentence number 5 - prison sentence of 2-3 years**

The 2-3 year imprisonment sentence was recommended by respondents for the crimes of fraud and political intimidation (16% each respectively), corruption (13%), fiddling income tax (11%) and smoking dagga and stealing R100 worth of goods from a shop (9% each respectively). 30 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.21 (Table 6.2). Looking at the sub-category of race it is noted that Blacks and Coloureds chose this sentence the most (figure 6.10).

#### **6.4.2.3 Sentence number 4 - prison sentence of 1-2 years**

The 1-2 year imprisonment option was recommended by respondents for the crimes of fiddling tax (16%), political intimidation (14%), prostitution (11%) and stealing R10/R100 worth of goods from a shop (10%). 32 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 4.06. Looking at the sub-category of race indicates that Blacks chose this sentence the most and Whites the least (figure 6.10).

#### **6.4.2.4 Sentence number 3 - prison sentence of 6-11 months**

The 6-11 month imprisonment option was recommended by respondents for the crimes of stealing R100 worth of goods from a shop (22%), followed some way behind by fraud at (11%) and drink/drive without death at (10%). Other crimes attracting this sentence were smoking dagga, fiddling income tax, prostitution, corruption and political intimidation, all below the 10 percent level. 27 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.92 (Table 6.2). Looking at the sub-category of race (figure 6.10), Coloureds are shown to have chosen this sentence the most.

#### **6.4.2.5 Sentence number 14 - committal to an institution**

The committal to an institution option was recommended by respondents for the crimes of smoking drugs (50%), drink/drive without death (21%) and prostitution (19%). This result clearly denotes a respondent call for rehabilitation in relation to the so called choice type crimes. 26 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.87 (Table 6.2). Looking at the sub-category of race it is shown that Coloureds and Whites chose this sentence most and Blacks the least (this reading for the Black group is the smallest of all the chosen sentences) (figure 6.10).

#### **6.4.2.6 Sentence number 19 - a fine of R600+**

The fine of a R600+ option was recommended by respondents for the crimes of corruption (22%), fiddling income tax (20%), fraud (16%) and drink/drive without death (12%). 25 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.84 (Table 6.2). Looking at the sub-category of race it is noted that once again Coloureds and Whites chose this sentence the most and Blacks the least (figure 6.10).

#### **6.4.2.7 Sentence number 21 - correctional supervision**

The correctional supervision sentence was recommended by respondents for the crimes of smoking dagga (26%), prostitution (21%), political intimidation (10%) and stealing R10 worth of goods (11%). 28 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.76. However, the seriousness level is decreasing with 5 percent of respondents classifying these crimes as not at all serious. Looking at the sub-category of race it is noted that Blacks and Coloureds chose this sentence the most (figure 6.10).

#### **6.4.2.8 Sentence number 23 - suspended sentence**

The suspended sentence was recommended by respondents for the crimes of stealing R10 worth of goods from a shop (18%), political intimidation (17%), stealing R100 worth of goods from a shop (13%), drive over alcohol limit (11%) and prostitution and corruption (10% each respectively). 21 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.57. However, once again, 6 percent of respondents classified these crimes as not serious. Looking at the sub-category of race it is indicated that, as with bodily harm crimes, Whites choose this sentence the most (figure 6.10).

#### **6.4.2.9 Sentence number 18 - a fine of R100 to R500**

The fine of R100-500 was recommended by respondents for the crimes of stealing R100 worth of goods from a shop (24%), fiddling income tax (18%), prostitution (16%) and fraud

(10%). 19 percent of respondents denoted these crimes as very serious and recorded a mean seriousness score of 3.29. 9 percent of respondents again classified these crimes as not serious. Looking at the sub-category of race it is seen that Whites choose this sentence more than any of the other three races and to a greater degree in relation to the other sentences considered for the secondary harm crimes (figure 6.10).

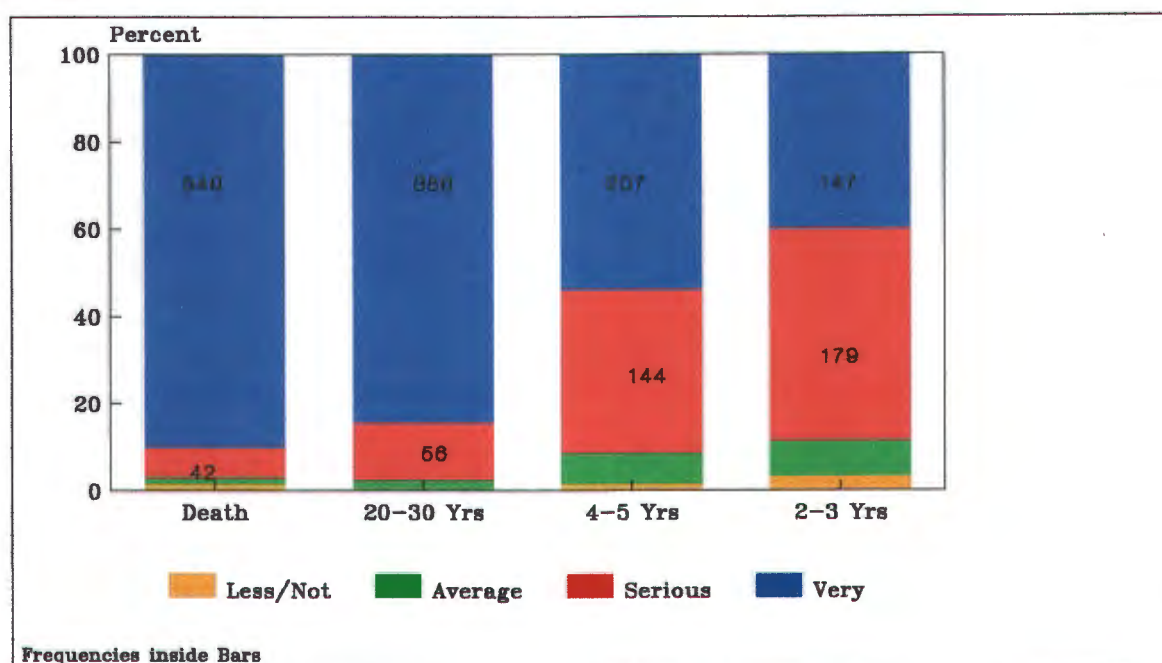
### 6.4.3 The property crimes

Again, utilising the same formulation, but this time for 2 crimes and 400 respondents there will be 800 possible sentences divided amongst 23 sentence options. Respondents predominantly recommended imprisonment, with 33 percent indicating a prison term of less than 3 years and 16 percent indicated 4-9 years. 9 percent indicated a fine, 9 percent indicated whipping, 8 percent indicated the suspended sentence, 15 percent indicated a prison term and/or correctional supervision and 8 percent, over 10 years prison term.

### 6.4.4 Overview: the bodily (personal) and secondary harm crimes

Looking at Tables 6.1 and 6.2, it can be seen that the first six ranked harsh sentences provide similar mean seriousness scores, indicating what one might term a like public conception of crime severity. This may be explained through what Pease (1988) earlier distinguished as the ability of respondents to denote and agree upon what the most serious crimes are. This overall agreement can justify both the need to survey public opinion on a regular basis and, thereafter, provide the potential to diversify sentencing decisions in a democratic fashion across both the judicial and the public spheres.

**Figure 6.11: most commonly chosen sentences, seriousness in bodily (personal) harm crimes**

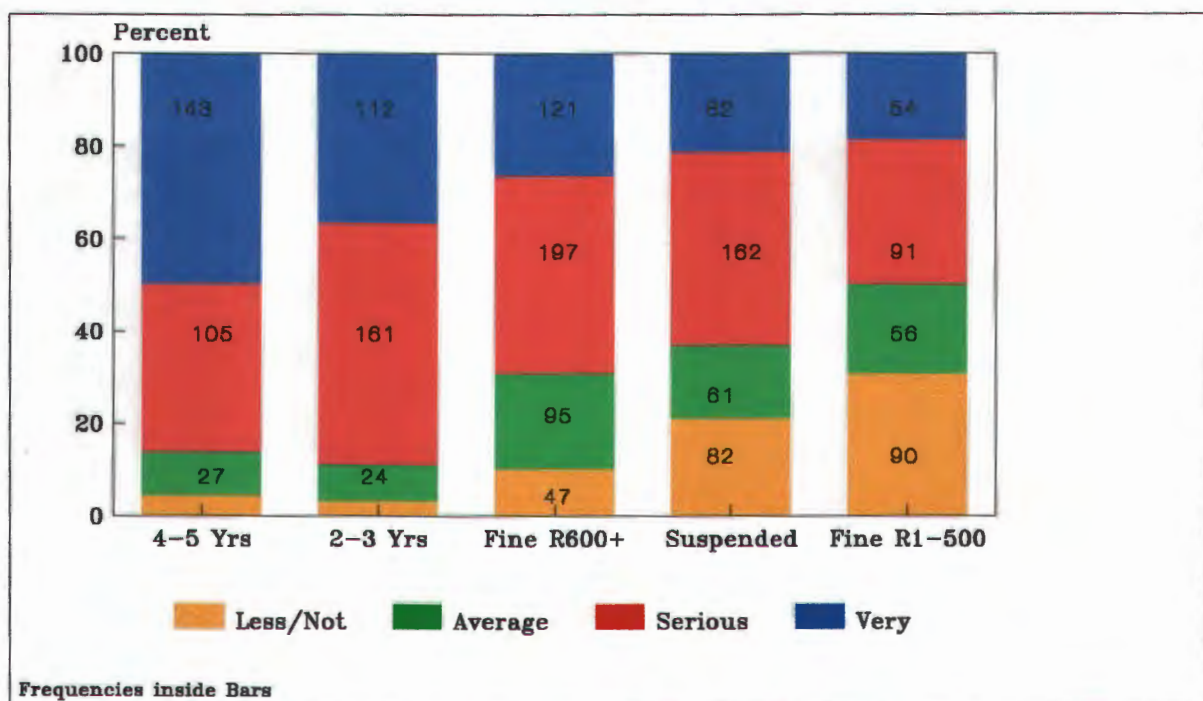




For all crimes it is obvious that respondents support the death penalty for what they consider to be the most serious crimes, viz., rape, driving over the alcohol level causing the death of an innocent victim, terrorism and murder (as noted earlier) with a death sentence mean seriousness score of 4.85 for bodily harm crimes, and 4.82 for secondary harm crimes. Closely aligned to the death penalty is the sentence of 20-30 years imprisonment with a mean seriousness score of 4.81 for bodily harm crimes - a sentence noted in the guide in Chapter 7 to follow, as a sentence which in relation to public perceived sentence severity, is interchangeable with the sentence of death - although a lower seriousness score of 4.65 is recorded for the secondary harm crimes. The mean scores provide a concise picture of public perception on the decreasing gradation of seriousness and sentence for specific crimes in society, many of which follow what can be termed the common sense evaluation of harm.

Alternatively figures 6.11 and 6.12 show percentages of those respondents selecting each sentence and classifying crimes as very serious, serious, average and less serious. Clearly as figure 6.11 shows, classifying as very serious decreases significantly with sentence severity, from death to 2-3 years. Similarly, figure 6.12 shows how percentages classifying as less serious increases with more lenient sentencing. One sees that prison terms correspond to more serious crimes and fines to less serious crimes.

**Figure 6.12: most commonly chosen sentences, seriousness in secondary harm crimes**



As the ranking tables, 6.1 and 6.2, form the basis of the South African sentencing guide in Chapter 7 to follow, it is informative at this point to make one or two further points here. For example, one can also note that:

- a) ranks based on mean seriousness scores for sentence of 4-5 year prison term and above, are the same for bodily and secondary harm crimes
- b) in relation to the bodily harm crimes, sentences of supervision and institutional correction appear to be considered as harsher than 2-3 or 1-2 years imprisonment \*
- c) for all crimes, the sentences of R600+ and the suspended sentence occupy relatively low ranks \*

\* Note the similarities to Pease's (1988) findings at section 3.3 above!

#### **6.4.5 Comparisons between the South African research and the BCS**

As indicated previously, the general nature crimes were taken more or less directly from the 1984 British Crime Survey in order to attempt some correlative knowledge between the British and these research findings. Primarily the general nature crimes replicate the questions asked within the 1984 BCS (see Chapter 5, section 6.3 [p.148]). Like notions of seriousness can be detected and, it is argued here, extrapolated into sentencing preference. For example as respondents within the British research placed crimes which have an inference of bodily harm high on the seriousness ranking table, so do respondents within this research. In this respect Pease suggests that although there are many difficulties involved with trying to link seriousness scores to appropriate sentence, something of a pattern does appear to emerge between the two. For example, it was noted earlier that Pease (1988:41 & 44) says the BCS found that "...[concerning] crimes of a higher seriousness prison is more often chosen as the proper response to serious personal offences than to property offences [which were] judged equally serious....Generally...personal crime is responded to in a more extreme way than equally serious property crime.... [and, as already mentioned]... [A] general picture emerge[s] in which custodial sentences were seen as appropriate for the offences rated as the most serious...". It is apparent that these findings are also replicated within the research to hand. South African respondents do place the bodily harm crimes into the "higher seriousness" bracket, and "custodial sentence" is seen as the most "appropriate for the offences rated as the most serious".

As an indication of this one can consider the crime of a woman being sexually molested and pestered (given a seriousness rating of 2 from 14 within the BCS research and a seriousness rating of 8 from 22 within this research (see seriousness ranking [table 5.8]). High percentage seriousness scores were obtained within both research projects, i.e. 83% seriousness in the BCS and 89% seriousness in this research (notwithstanding the different methodologies). It can be argued that this finding supports the earlier proposition that survey populations are concerned with crimes which cause bodily harm to victims. Although no direct BCS correlations to sentencing preference for this crime are provided, it is noted above (see section 3.3), that South African sentence preference does indeed lean towards custodial despatch with well over half the South African survey public calling for imprisonment and a considerable number recommending a prison term of between 2-3 or 4-5 years. Thereby, it can be suggested that there is evidence to support seriousness weights across cultures, and that perceived seriousness can, if only precautionary, be equated to public sentencing preference. There are also further linkages between other research, the BCS and this research (primarily concerning seriousness but which again can be argued to have influence upon sentence), and an attempt to forge this link is undertaken in section 7.0 to follow, after consideration is given to mitigating circumstances on sentence choice and decriminalisation of certain specific crimes.

## **6.5 THE EFFECTS OF MITIGATING CIRCUMSTANCES**

In this section of the questionnaire respondents were asked to decide whether certain 'mitigating' circumstances/effects should be allowed to influence the courts choice of sentence. The five *effects* offered were:

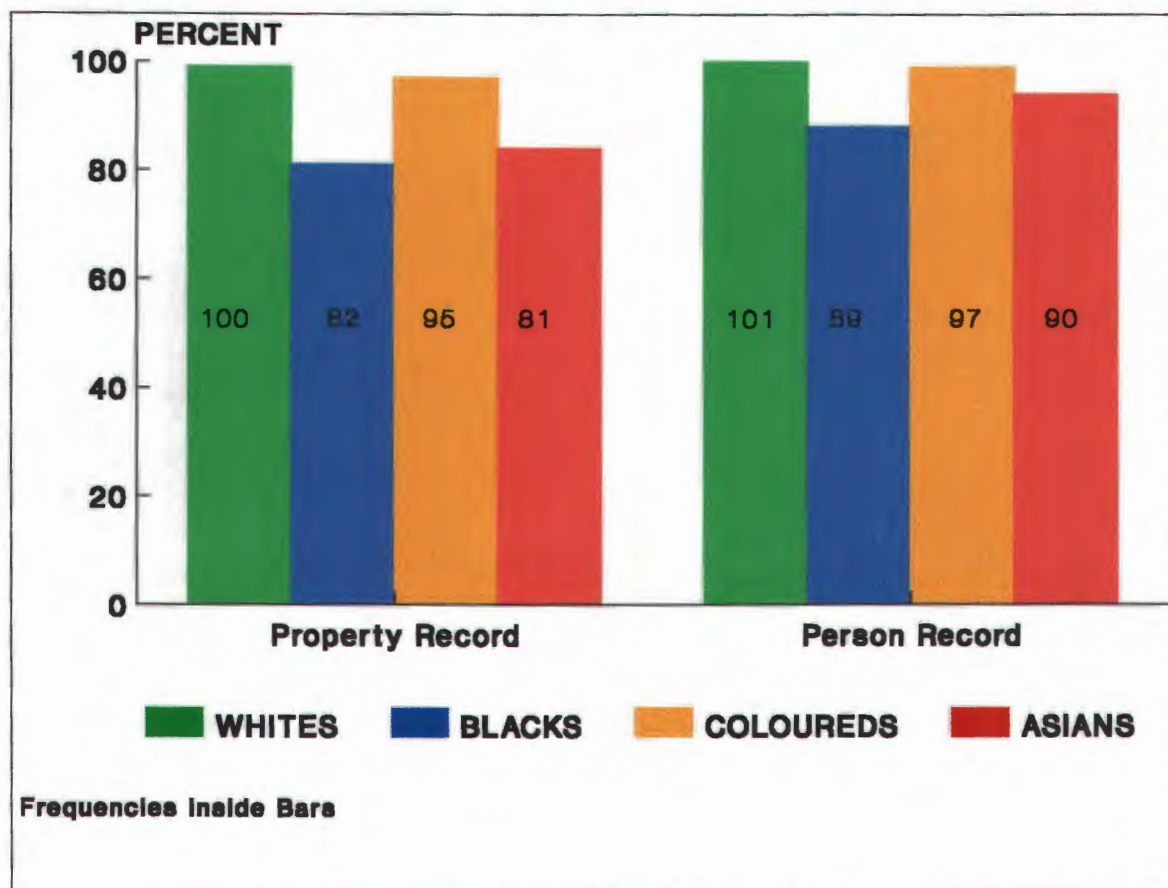
1. the offender has a prior record for the crime against property
2. the offender has a prior record for the crime against the person
3. the offender is under 21 years of age
4. the offender is over 60 years of age
5. the offender is female

Respondents were asked to decide, against each effect in turn, whether a harsher sentence or a lighter sentence should be imposed, or if it made no difference.

Recorded responses indicated that prior record, both against property and the person, provoked respondents to be harsher in their sentencing practice in general. Further, Whites and Coloureds, as opposed to Blacks and Asians, are more inclined to choose a harsher sentence. For example, figure 6.13 shows at least 97 percent of Whites and Coloureds, compared to less than 85 percent of Blacks and Asians chose the harsher sentence option for

property crimes given a prior record and 99 percent of Whites and Coloureds, as opposed to 94 percent of Blacks and Asians, chose the harsher sentence option for crimes against the person given a prior record. This pairing of race group can be correlated to the findings in Chapter 5, sections 5.3.1 [p.141] on input into sentencing (see figure 5.1, Chapter 5 [p.143]), where it was noted that Whites and Coloureds, as opposed to Blacks and Asians, call more strongly for an input into the sentencing forum.

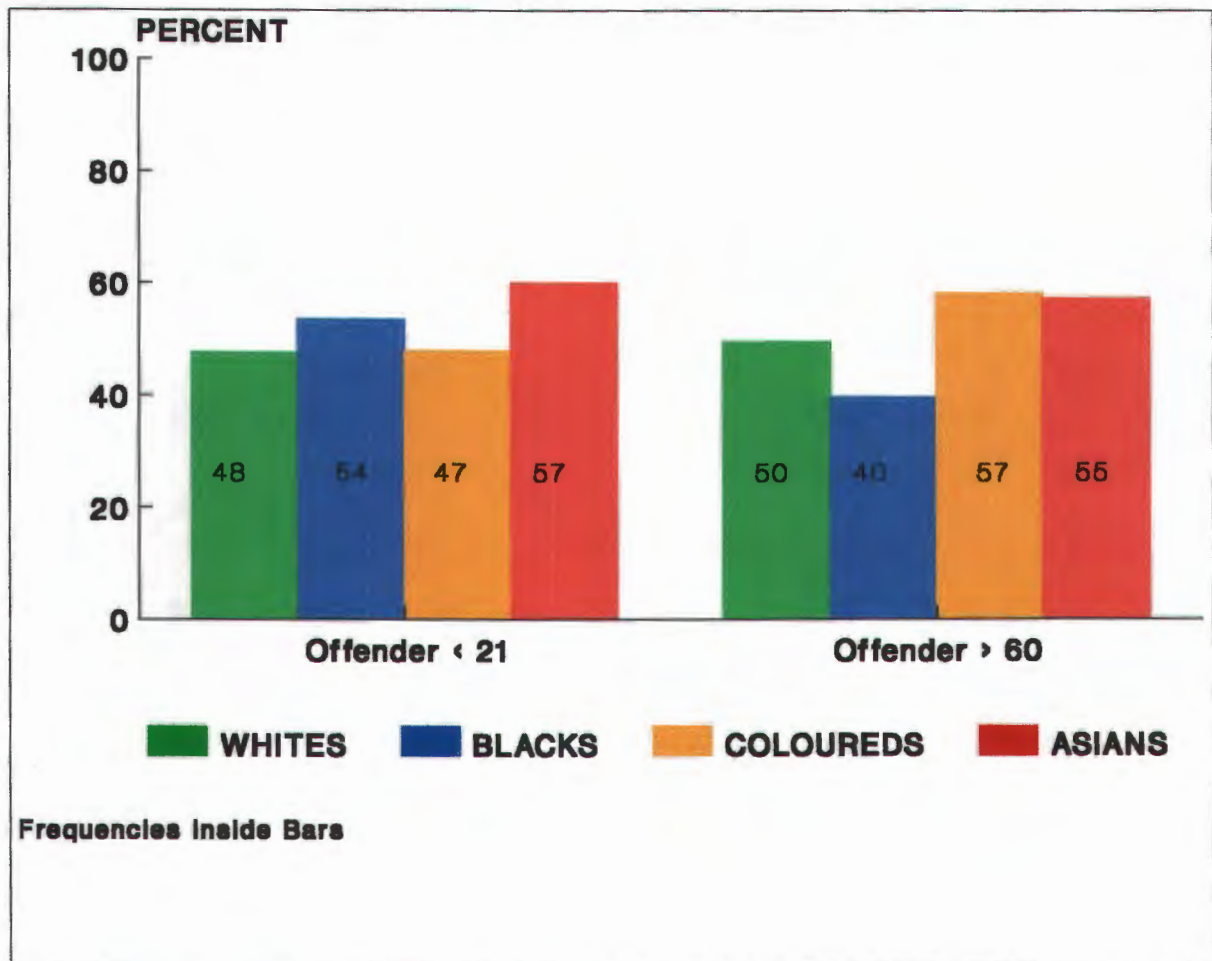
**Figure 6.13: mitigating circumstances, % imposing harsher sentences/ prior record**



The age of an offender provided a different pattern, a pattern which may be said to appear more caring. Frequency scores for the sentence of an offender under 21 years of age show a more even distribution with slightly higher percentages appearing in the usually a lighter sentence category, reminiscent perhaps of a Utilitarian outlook. For example the highest lighter score is provided by the Asian group at 60 percent as opposed to the highest harsher score of 23 percent from the Black group. Overall 52 percent of responses appear in the lighter category as opposed to 31 percent in the makes no difference category and 17 percent in the harsher category.



**Figure 6.14: mitigating circumstances, % imposing lighter sentences/age**



Looking at the over 60 years of age offender, the scores appear similar to the scores recorded for sentence of an offender in the under 21 category. Here the Coloured group provide the highest lighter score at 58 percent as opposed to the highest harsher score of 24 percent (again from the Black group), whilst overall 51 percent of responses appear in the lighter category as opposed to 38 percent in the makes no difference category and 11 percent in the harsher category.

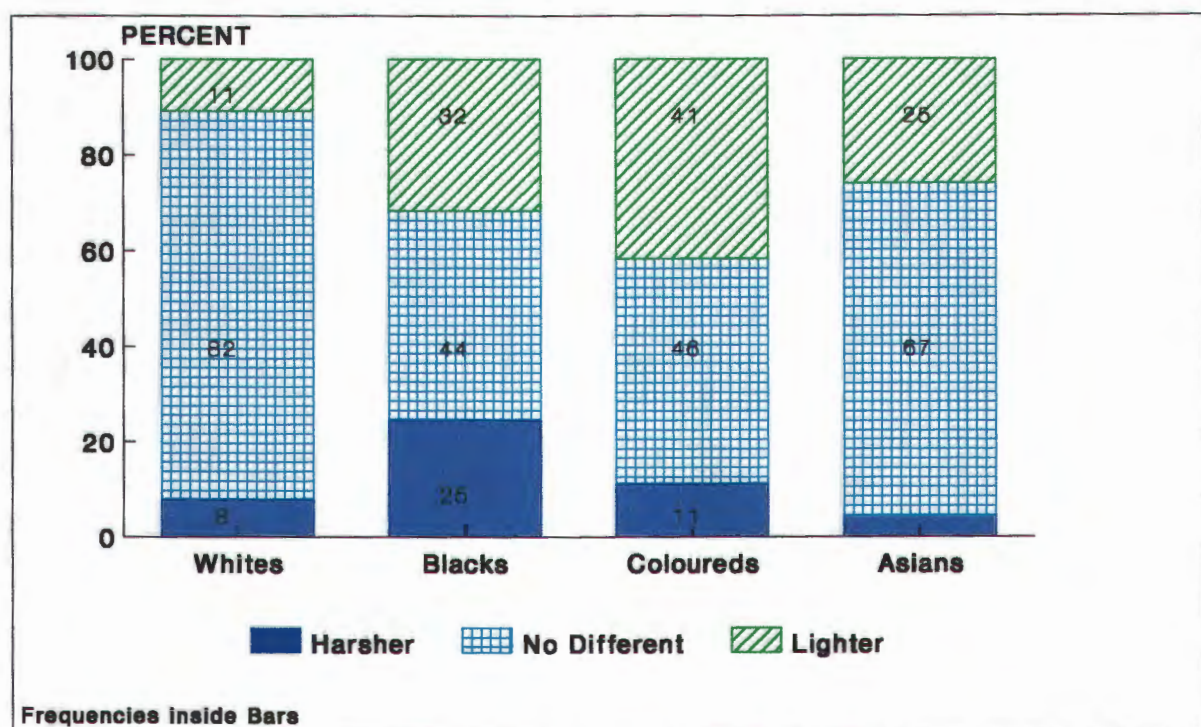
Therefore, considering the mitigating effects of prior record or lesser/greater age, one can tentatively suggest that respondents require offenders with prior offences to be treated more firmly by the courts, whilst the young and old offenders be afforded some leniency. Further research is needed in this area if the two categories are to be combined, i.e the young offender with prior convictions or the older offender with prior convictions.

Considering the female offender, it was noted in section 3.3 above by Kapardis & Farrington (1981), that the female offender is often seen as different from other offenders, and it may prove pertinent to offer some word of explanation as to why this might be so before considering the survey findings.

There is a common belief that women are treated differently by the courts and this belief can be placed quite successfully into two different camps. Firstly, that females are sentenced more harshly within the penal system. This belief can be said to uphold the oft found literature argument that females are doubly blameworthy, having failed firstly as a subject/citizen and secondly as a Mother. Alternatively, the belief exists in literature to argue that females are sentenced more lightly within the penal system. This belief can be argued to present as partially oppositional to the "more harshly" argument. For example, that female offenders receive more favourable treatment by the courts because of their gender.

Both arguments can be substantiated within literature on the subject, leading to what one may term, the perception that once females fail, that failure is in someway abnormal, and definitely different to male failure. In this respect, the female offender is seen as sick, her wrong actions are pathologically or biologically based and, unlike the male offender, wrong actions are not located within the sociological ambit of poverty, unemployment or lack of education, which in sociological (and Marxist) terms, somehow produce criminal tendencies in humans, or in this case, within the male offender (variously, in Naude' 1986).

**Figure 6.15: mitigating circumstances, sentencing of female offenders**



Whatever one's personal leaning with regard to the harsher/leniency debate concerning the female offender, in terms of the South African research the argument either way appears to hold little sway. The Pretorian public do not, as a generalisation, support either argument eluded to above. Overall, 60 percent claim that gender makes no difference, with the highest makes no difference score recorded by the White group at 82 percent. The highest harsher score is recorded by the Black group at 25 percent and the highest lighter score by the Coloured group at 41 percent. However, one might be able to suggest that such a result does show a certain bias. The percentages recorded in the makes no difference category for this particular "mitigating circumstance" are consistently higher than for any of the other four "circumstances". This in itself may be indicative of what one might call a sub-conscious perception that there is something quite different about a female offender. Interestingly more females chose the lighter sentence for their own gender offender than did the male respondents.

It is perhaps informative to note, however, that Kapardis & Farrington (1981:110), conducting an experimental study of sentencing by magistrates in England and Wales, indicate that mitigating circumstances do have a part to play in sentencing with regard to magistrates. For example they say that:

*...the previous criminal record of the offender is...important, both in regard to the number of previous convictions and their similarity to the current offence [a situation which, since the introduction of the 1991 Criminal Justice Act in the U.K., now no longer exists: courts are not allowed to take into consideration prior offences, save in the case of motoring misdemeanours where points for each offence are added up until the disqualification from driving point is reached]. The age of the offender is also important, with both older (over 60) and younger (under 21) offenders receiving more lenient sentences, although according to Thomas (1979, p. 195) "...youth continues to have some value as a mitigating factor throughout the early twenties." The sex of the offender is not thought to influence sentencing except insofar as mothers of small children are kept out of prison.*

## **6.6 DECRIMINALISATION OF CERTAIN CRIMES**

In section D of the questionnaire respondents were asked to give their opinion on the decriminalisation of certain crimes. Five culpable crimes were identified:

1. prostitution
2. possession of dagga
3. gambling



4. abortion

5. homosexuality/lesbianism

Three score options were offered: "yes" - should remain a crime, "no" - should not remain a crime, and "don't know".

#### **6.6.1 Decriminalisation of prostitution**

Fairly high percentage scores were indicated by all sub-categories for the retention of prostitution as a culpable crime with 61 percent overall. The highest positive response was recorded by the least educated group at 72 percent and the lowest response came from the no-religion group at 36 percent. The highest negative response was indicated by the White group at 41 percent. Primarily, and as might be expected, the older group and the female group are more in favour of prostitution remaining a crime at 74 percent and 65 percent respectively. Relative to other crimes, prostitution has a low seriousness score (see table 5.9 in Chapter 5 [p.152]) and consequently attracted less harsh sentences (see figure 6.2 herein). The consistency of respondents is shown by those who consider the crime as serious, being more likely to advocate that it remains a crime - the 95 percent confidence interval for seriousness score of those wishing prostitution to remain a crime is (3.89, 4.14), far removed from the confidence intervals of those recommending the decriminalisation of prostitution at (2.35, 2.85).

#### **6.6.2 Decriminalisation of the possession of dagga**

Here all sub-categories indicate retention of the possession of dagga as a crime above the 70 percent mark with many categories recording into the higher 80 percent bracket. The highest negative response is recorded by the no-religion group at 45 percent, followed some way behind by the professional group at 26 percent. Very few responses are indicated in the "don't know" category.

As there were racial differences in seriousness scores, so racial differences appear here. For example it will be recalled that Asians consider this crime more serious than other race groups and here consistency of findings is upheld with nearly 88 percent of Asians calling for retention as a crime, compared to the other race groups who score in the higher 70 percent bracket. Overall, consistency is again reflected by those registering it as more serious being more inclined to call for retention, viz., 95 percent confidence interval for mean seriousness scores for those wishing it to remain a crime is (3.93, 4.15) whilst for those wishing to decriminalise it, the confidence interval is (2.12, 2.71) - readings which once again show considerable differential.



Dagga smoking had mean seriousness scores which were relatively low and was thereby low in ranking, although higher than prostitution, and more of the survey public wish to keep it as a culpable crime (selling/pushing of drugs has the highest seriousness score in the secondary crimes).

As a point of interest concerning drug related offences, the London Daily Express of 4 October '96 reports that America is busy instigating special courts for drug addicts which are proving highly successful. Noting that Miami was the first state to introduce the special drug court, the report indicates that,

*...90 per cent of first time offenders have kicked the habit and gone straight. Addicts are sent to the courts as an alternative to jail and put through intensive rehabilitation programmes at day centres until they are drug-free. In June, the Association of Chief Police Officers (U.K.) recommended the introduction of a similar scheme in Britain (1996:19).*

Also in London, the recently held Cannabis Conference argued, according to Sherman (1996, in The Herald, 22 October), that:

*...throughout a day [of celebrations] cannabis and its many uses in industry, food, medicine and, of course, relaxation [were] lobbied.*

The Cannabis Conference advocated, amongst other things, that legalisation is called for and that such legalisation should be seen in commercialised terms like tobacco. People should be allowed to grow enough plants for their own use or be allowed to purchase their needs from legal outlets such as police stations and chemists. Reasons given to the Conference for the need to legalise cannabis varied from deteriorating quality (promoting illness rather than argued well-being) to the suggestion that:

*[U]nlike alcohol, cannabis has not been shown to promote aggressive or violent behaviour...If everyone smoked cannabis, we'd live in a much more chilled-out society.*

The Dutch at the Conference spoke of the system in The Netherlands "...where marijuana is illegal but tolerated in small quantities". Whilst in the United States, the Cannabis Cultivators Club has won its battle to provide legal drugs to its members under Proposition 215. The aim is to offer legal prescriptions for cannabis to ease the suffering of the very sick, for example in the treatment of cancer and aids patients where the more usual scientific drug regimes fall

evermore short of providing relief. In such cases doctors in the United States are increasingly prescribing cannabis treatments, although many people are wary of the consequences of the new legalisation and have formed a group to sue the Clinton administration to try to block the sanction (The Weekly Telegraph, issue No.17).

Such debate is interesting when considered in relation to the low prison numbers in The Netherlands (discussed variously within other chapters of this work), and serves to highlight both the different trends between criminal justice systems on how best to handle the drug problem and, the differing cultural beliefs of the public in relation to democratic choice.

### **6.6.3 Decriminalisation of gambling**

Here responses are more evenly divided between those for and against with 52 percent overall recording responses for decriminalisation. Asians are the least in favour of decriminalisation (49%) compared to Whites at 29 percent. Similarly males more than females, the younger and the most educated - perhaps the most wealthy sub-groups - appear to favour decriminalisation.

### **6.6.4 Decriminalisation of abortion**

Here the survey public are strongly against the decriminalisation of abortion with 67 percent overall wishing to retain it as a culpable crime. High positive scores are to be noted throughout the sub-categories with percentages often recorded in the upper 70 percent bracket. Primarily, Whites, Coloureds, females and the least educated are for its retention as a crime, whilst Blacks, Asians, males and the more educated are more for decriminalisation. One might surmise that educational level can be equated to a forward looking outlook which acknowledges that decriminalisation of this crime is somewhat inevitable in the long run. This may be indicative of a belief that if it's going to happen anyway, perhaps it should happen in a controlled fashion rather than in the guise of a backstreet activity which produces more suffering and problems for society.

Interestingly this response is upheld by a recently run survey in response to The Termination of Pregnancy Bill which was gazetted in South Africa on the 27 September 1996\*, the portfolio of which invited submissions from the public. In response, a nationwide poll was conducted in which 3 300 people in metropolitan areas took part. Leger (1996:9, in The Sunday Times of 6 October) reports that only 23 percent of respondents were in favour of abortion, but in some instances support was apparent. He says,

*The strongest support came for abortion in the case of rape, with eight out of 10 people saying they would support termination of pregnancy in such a case.*

*Support... was slightly higher in affluent sectors. Abortion in the case of the mother's health being endangered was supported by about seven out of 10 people, with a similar number agreeing to abortion if the mother had AIDS, or there was a chance of a defective baby. There was slightly less support for abortion if the mother was mentally handicapped...[and] only two to three people approved of abortion if the parents could not afford more children [or] if the woman decided she did not want a child or ...[was] unmarried*

\* Subsequently, The Choice of Termination of Pregnancy Bill was legalised by Parliament and came into effect on February 1 1997

#### **6.6.5 Should homosexuality/lesbianism be considered a crime?**

Here, once again, responses are more evenly divided with 36 percent of respondents calling for retention and 46 percent calling for decriminalisation. The Whites record strongly in favour of decriminalisation at 65 percent and both the younger and more educated groups tended to take the decriminalisation position. There was no difference in the response of males or females. One might offer speculative reasons for this relatively liberal outlook, for example that Whites, the young and the more educated tend not to hold the same prejudices as other categories. In relation to youth one might suggest that the young have witnessed the growth of individual human rights in the area of sexual preference and have come to accept what can be termed *the "coming-out" culture*. Likewise, the more educated, perhaps realising the relatively more dangerous problems in society - for example the rise in serious crimes like murder and the problem of drugs - have come to accept that sexual preference is no longer such a "big deal".

#### **6.7 OVERALL RESEARCH COMPARISON**

As already suggested it is possible to note similarities between the British Crime Survey and other research findings in relation to seriousness and, via extrapolation, sentencing choice, which correlate with the research herein. For example, most researches report similarities concerning sex, age and victim as opposed to non-victim response in terms of seriousness and sentence choice. Pease (1988:10) notes in this respect that:

*There is a slight tendency for women to regard offences as more serious than do men.....*

The proposition that women see crime as more serious than men is also eluded to by Brillon (in Bottoms 1988:97-8) in the Canadian research into punitiveness. He states that:

*...women are less often... victims...[and yet] are more fearful...[but, he notes that females are] no more punitive than the rest of the population.*

It seems reasonable to assume that women as the more fearful group will also perceive crime as more serious than their male counterparts, and perhaps sentence offenders more harshly. Like the Canadian research, the findings herein show that female respondents do indeed consistently rate the seriousness of criminal acts higher than males - for example a woman being sexually molested and pestered received a seriousness rating from females at 92 percent compared to 85 percent from males - and they also correspond to Brillion's finding that females are "no more punitive than the rest of the population". In this respect it is noted that sentence preference between male and female in this research is almost exactly comparable, throughout all crimes offered for sentence.

Pease notes (1988:10) that:

*In most cases, there is a clear relationship between greater age and the view of crime as more serious.*

Once again, offering the suggestion that such a finding can be carried through to sentencing, this research appears to uphold this proposition with the older age group consistently presenting higher percentage scores for both seriousness and harsher sentence, and likewise victim and non-victim scores. Even remembering the relatively small numbers involved within the older age group population in this research, and treating the results with necessary caution, it seems fair to say that similarity of findings does exist between different research projects in many instances.

#### **6.7.1 Overview of research findings**

Finally, considering the findings on respondent sentencing preference reported herein and the previous discussion concerning various research findings, it would appear reasonable to proffer the hypothesis that research into public opinion on sentencing does provide similarities with research conducted in other parts of the world, and more specifically, with research conducted in the United Kingdom. As justification for South Africa to continue the work begun in this study, one can do no better than recount the words of Tuck from the "foreword" to the work of Pease (in Pease 1988:iii), as to the value of using crime surveys to measure perceptions of crime in society. She says that crime measurement is an invaluable tool which:

*...can give a picture of the crime problem from the perspective of actual...victims [and that] measurement over successive time periods [can] prove valuable in monitoring how attitudes to law-breaking change.*

In the new South Africa, with its ever increasing crime problem, no greater motivation for the inclusion of public opinion into sentencing practice can be found, save for the humanistic value of empowering all people to take part in decisions which affect their lifeworlds: most surely, the only value which denotes a democratic society. However, such a democracy is not lightly envisaged, or easily produced, and this point is brought home by Byrne, Lurigio and Petesilia (1992:312), who in discussing what works in sentencing, say that it is a:

*...challenging problem to engage the public, legislators, judges, correctional officials, and line workers in a process of rethinking how criminal justice problems are defined, how alternative solutions can be envisioned, and how responsibilities for action can be allocated. Effective policy has to be more than discovering what people want; it has to entail the creation of contexts in which people can critically evaluate and revise what they believe.*

Seen in this way there is much to be done to educate the public on what can be achieved given the restrictions and limitations on resources in any particular system. But, it can nevertheless be argued that public surveys are a worthwhile beginning for people to "discover what they want" and to "critically evaluate and revise what they believe".

## **6.8 CONCLUSION**

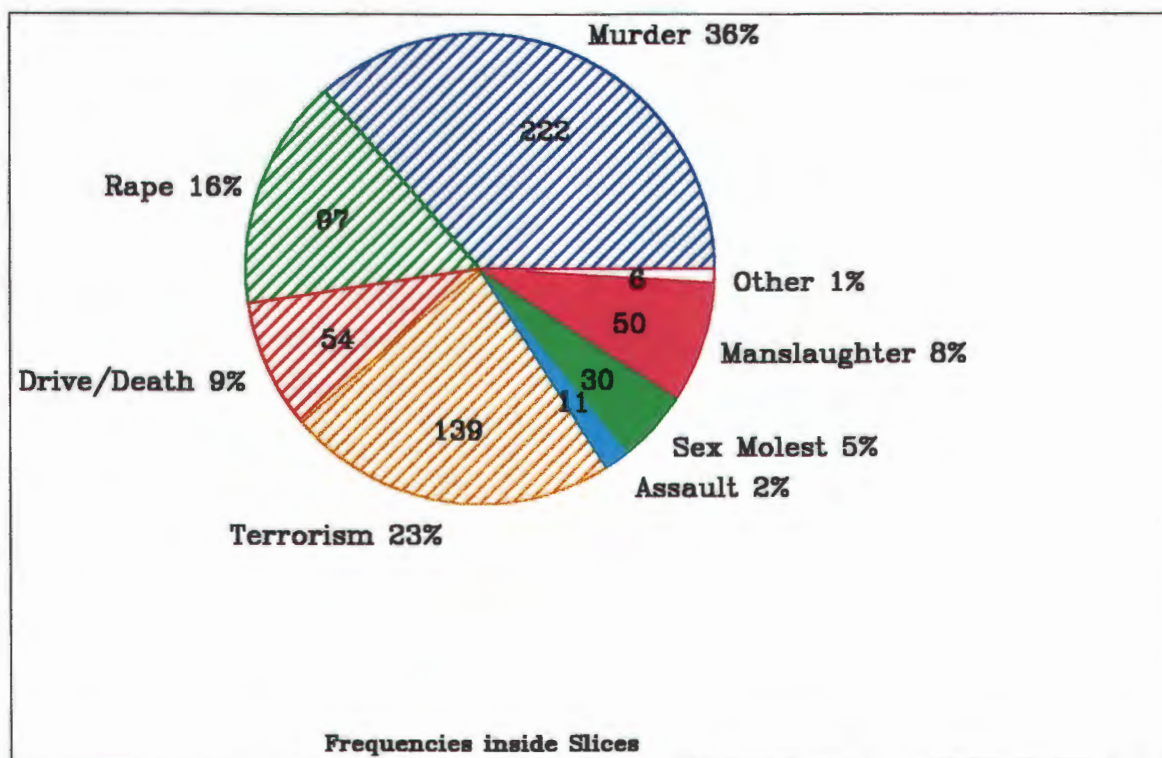
In this chapter the research findings into public opinion on sentencing in Pretoria have been reported. Using survey literature from various parts of the world, and more specifically from the United Kingdom, the South African publics' sentencing preferences have been correlated to provide a debate which integrates various other research findings. Where possible, specific correlative data has been utilised and the discussion has made an effort to link the sentence findings with seriousness scores from both South Africa and the United Kingdom.

In the final chapter (chapter 7) an attempt is made to draw through the theoretical sentencing debated in chapters 2,3 and 4, and to link this discussion to the findings of both the British and South African research. Chapter 7 culminates with a representation of the South African public's sentencing preferences in the form of a guide which scales sentence options in relation to seriousness scores.

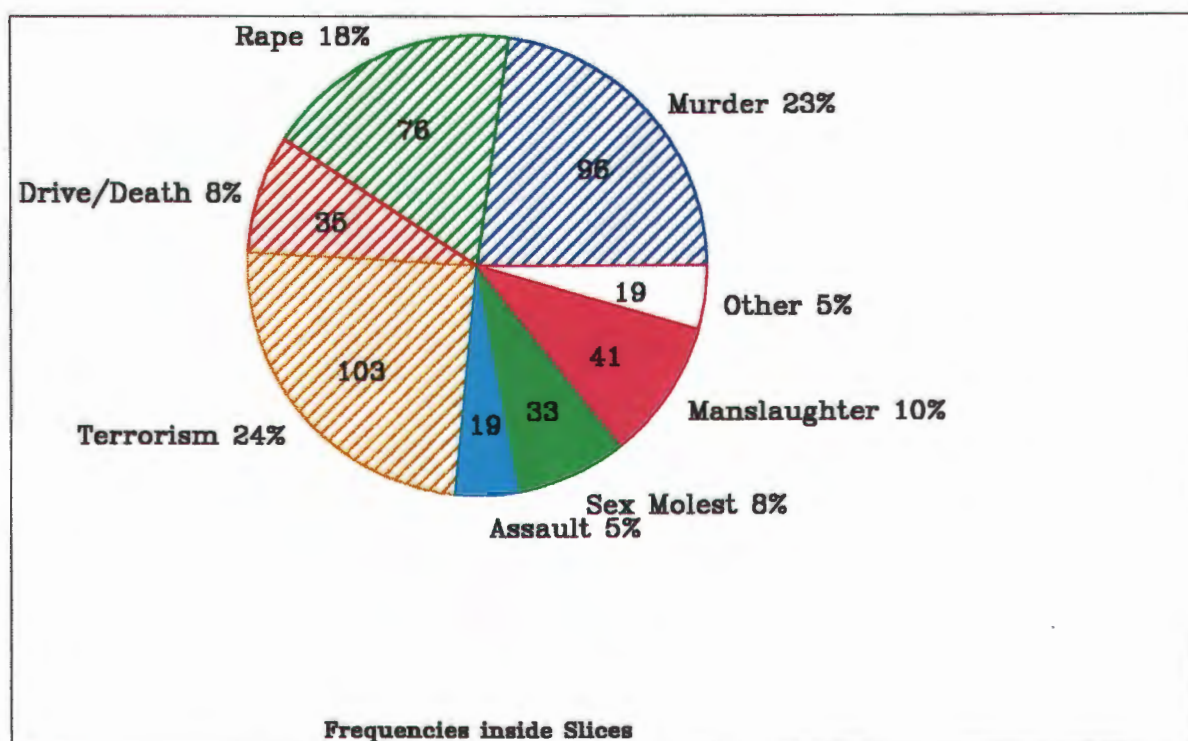
## Endnote 1

Pie charts for the 7 most commonly chosen sentences for the bodily (personal) harm crimes: percentage of each crime for each sentence

### Sentence 1: death penalty

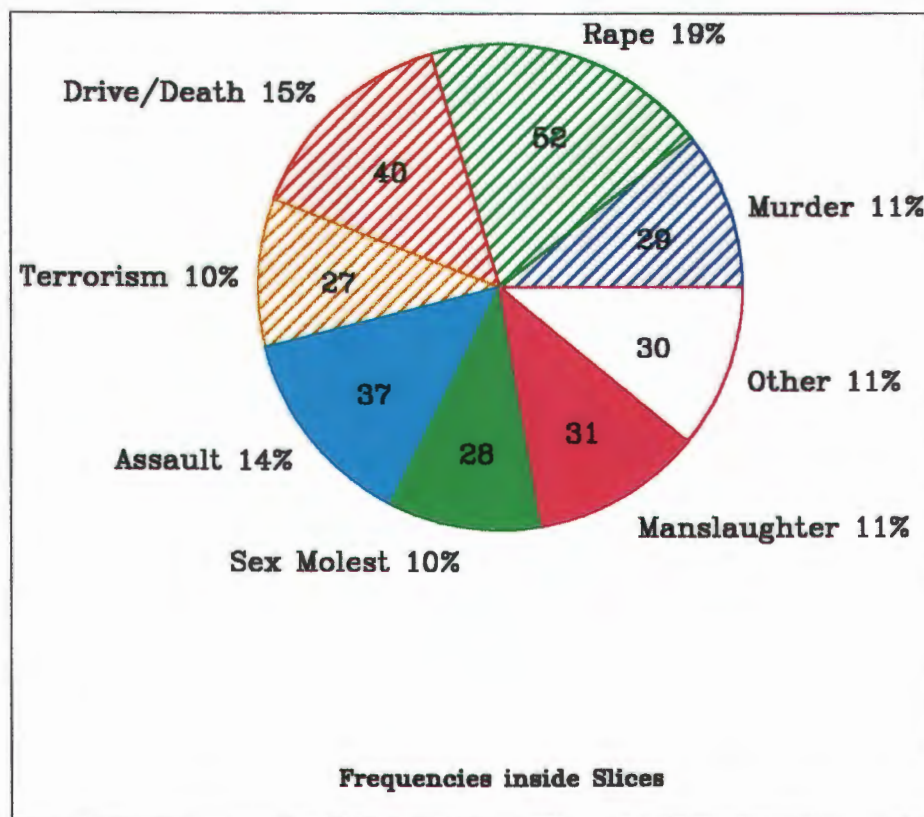


### Sentence 11: prison 20+ years

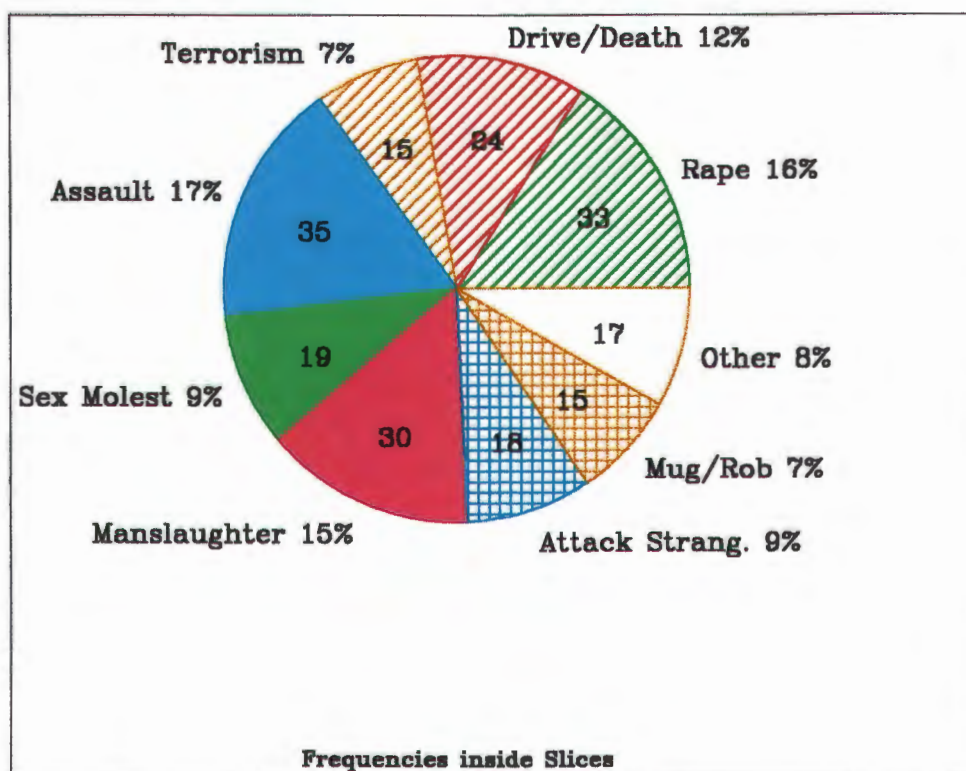




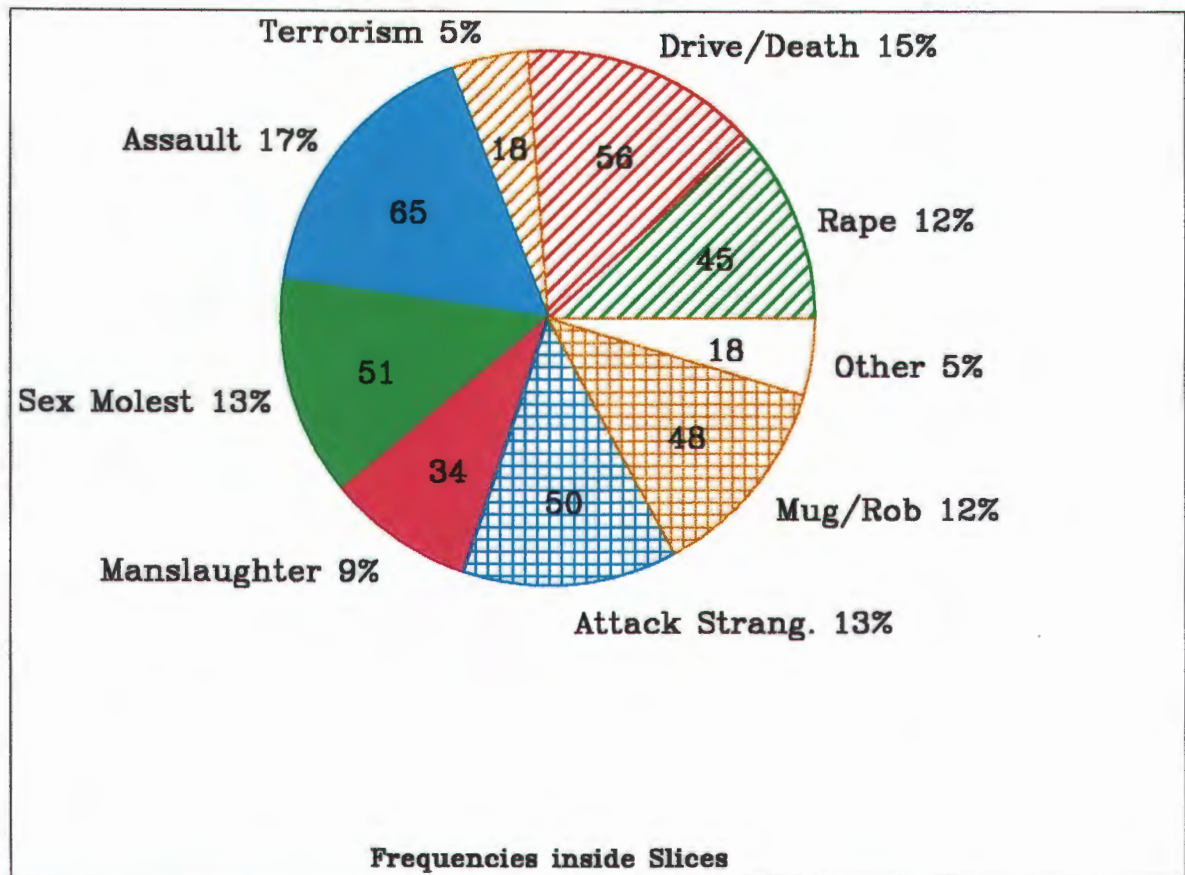
**Sentence 9: prison 10-14 years**



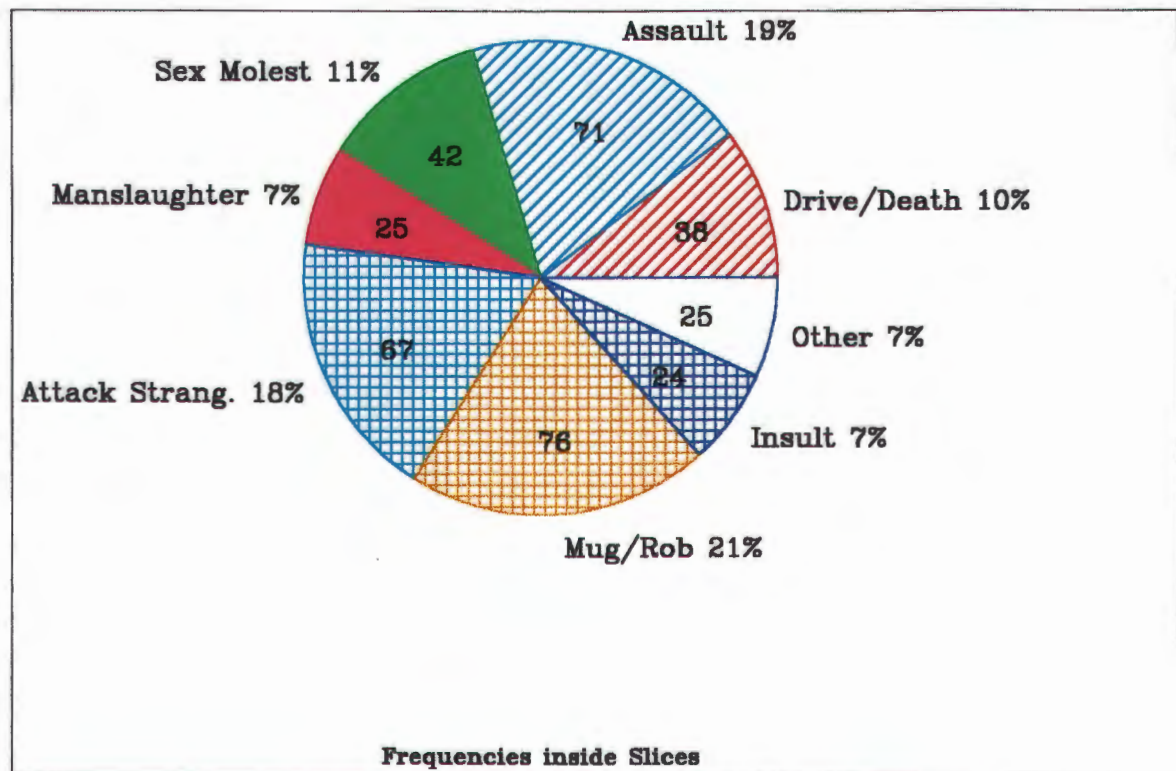
**Sentence 7: prison 6-7 years**



**Sentence 6: prison 4-5 years**

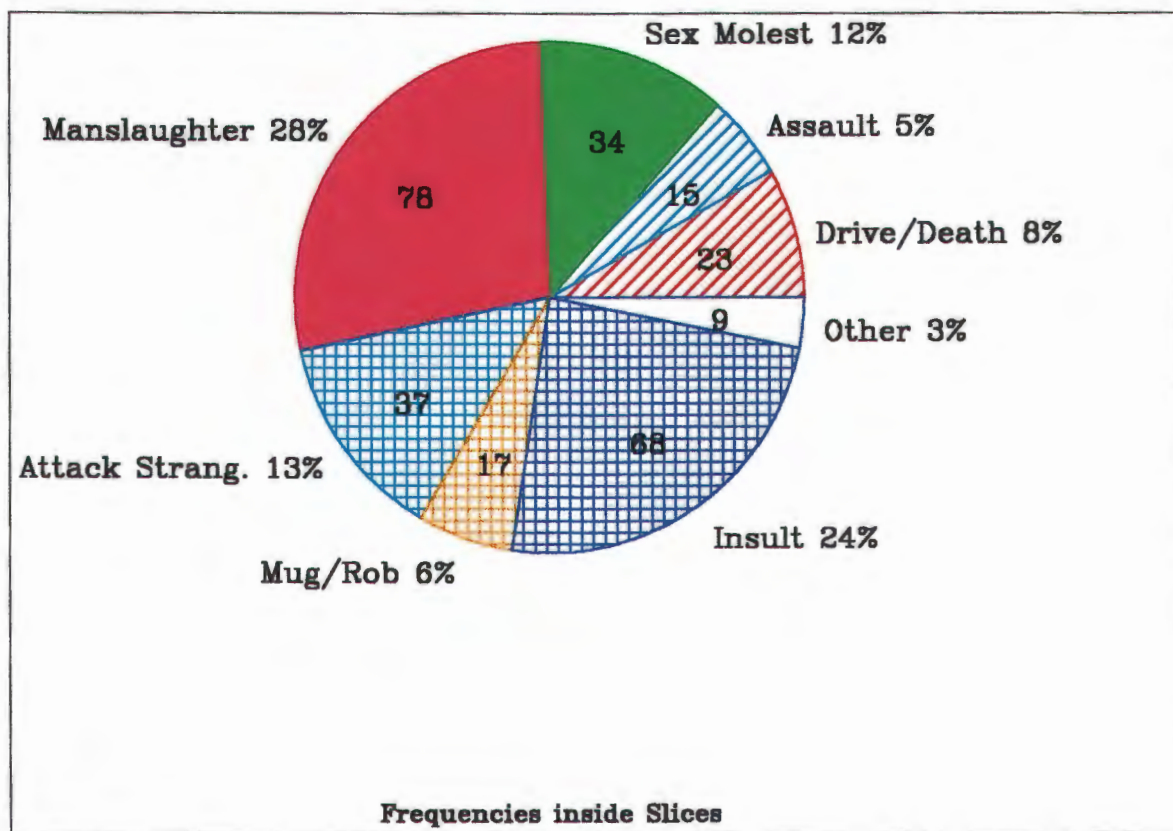


**Sentence 5: prison 2-3 years**



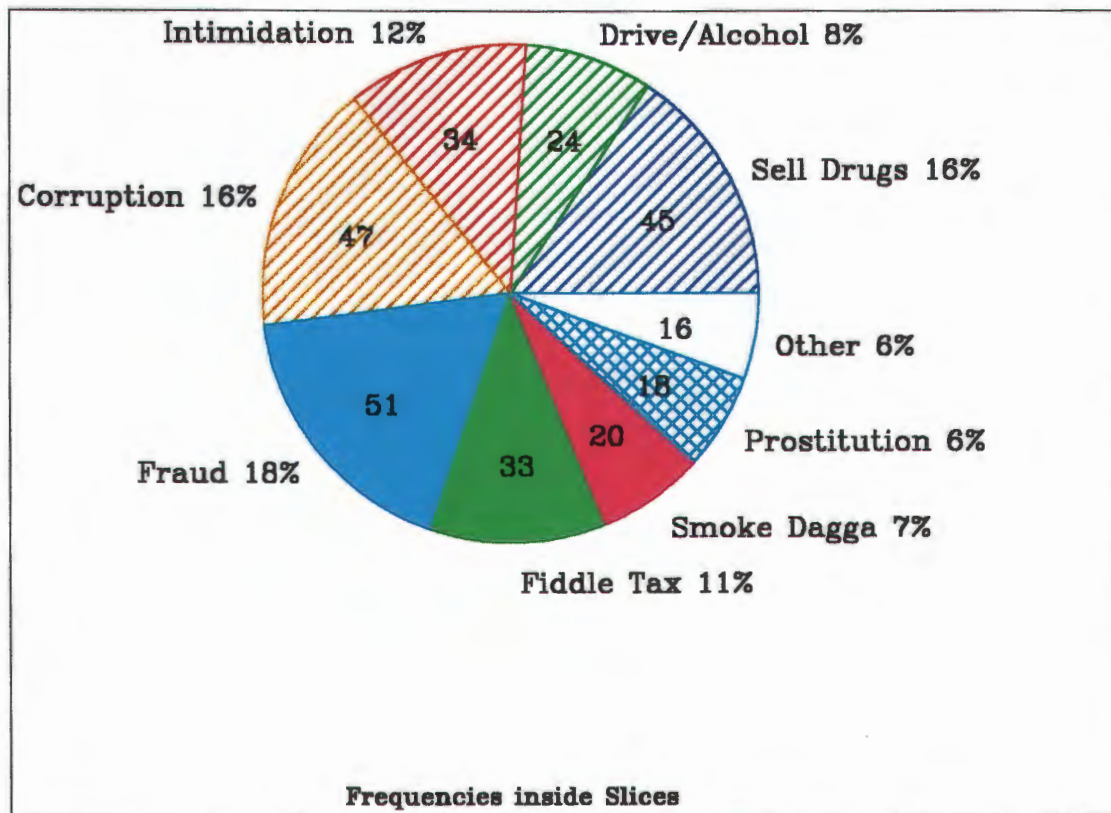


**Sentence 23: suspended sentence**

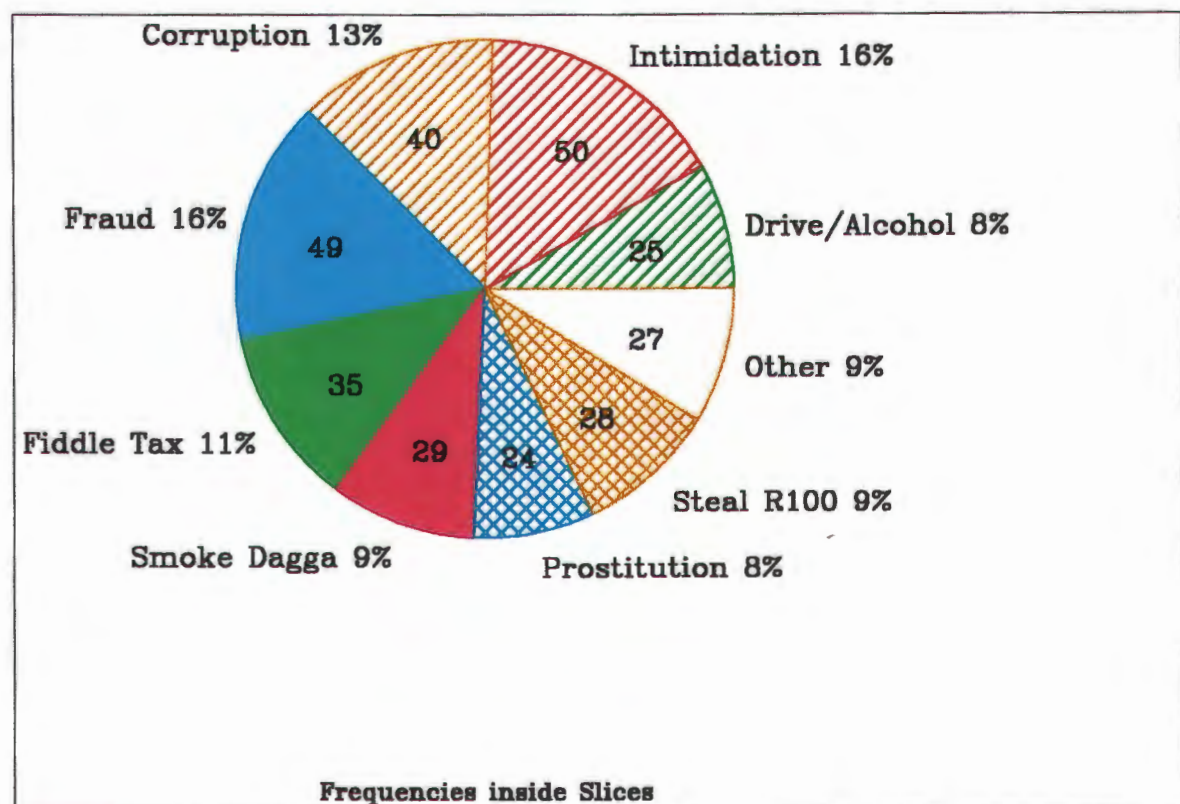


Pie charts for the 9 most commonly chosen secondary harm crimes: percentage of each crime for each sentence

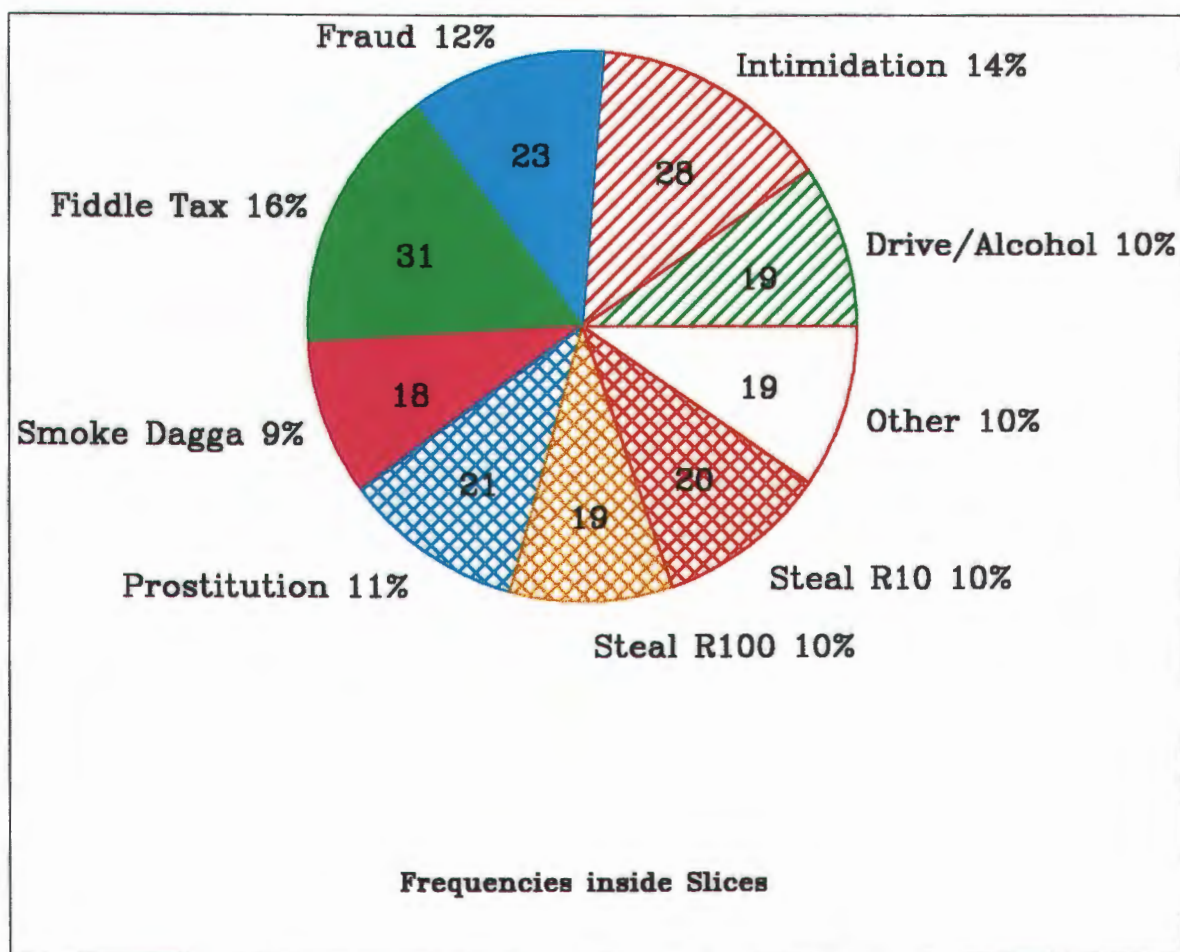
**Sentence 6: prison 4-5 years**



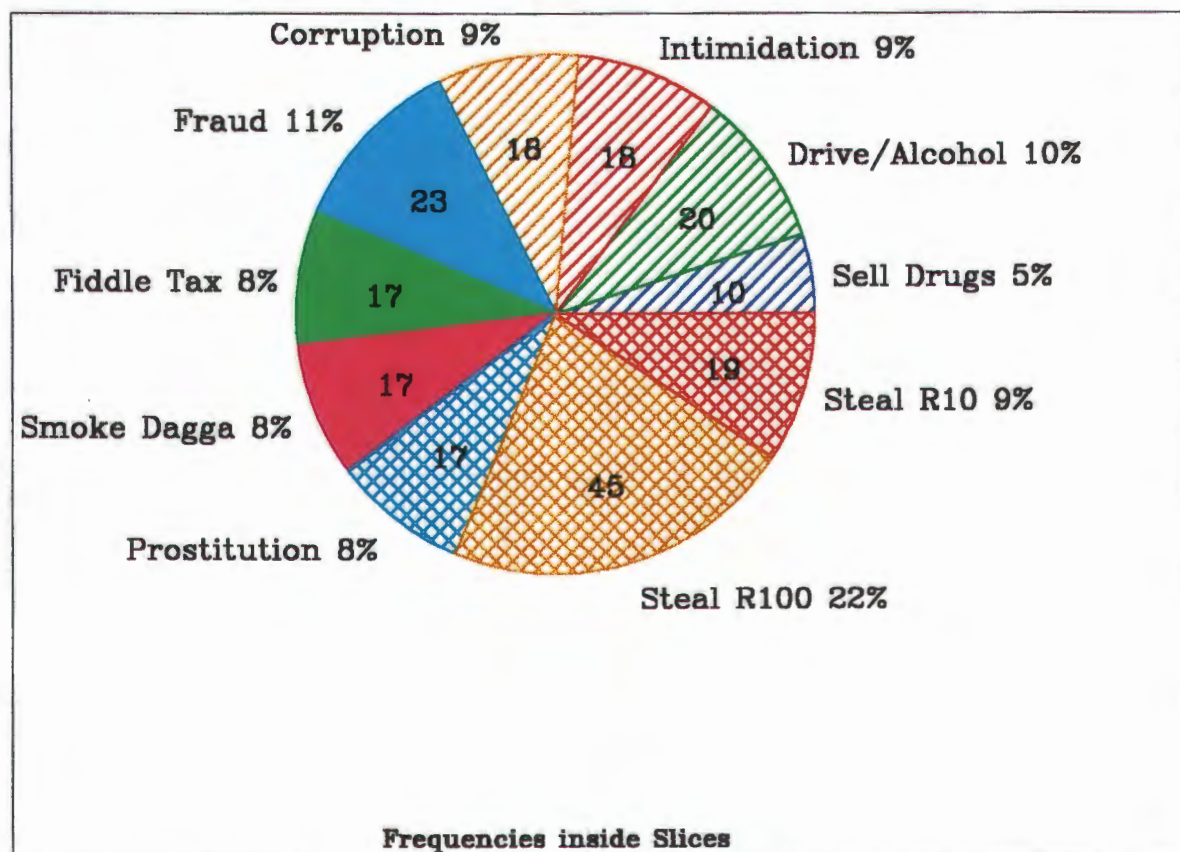
**Sentence 5: prison 2-3 years**



**Sentence 4: prison 1-2 years**

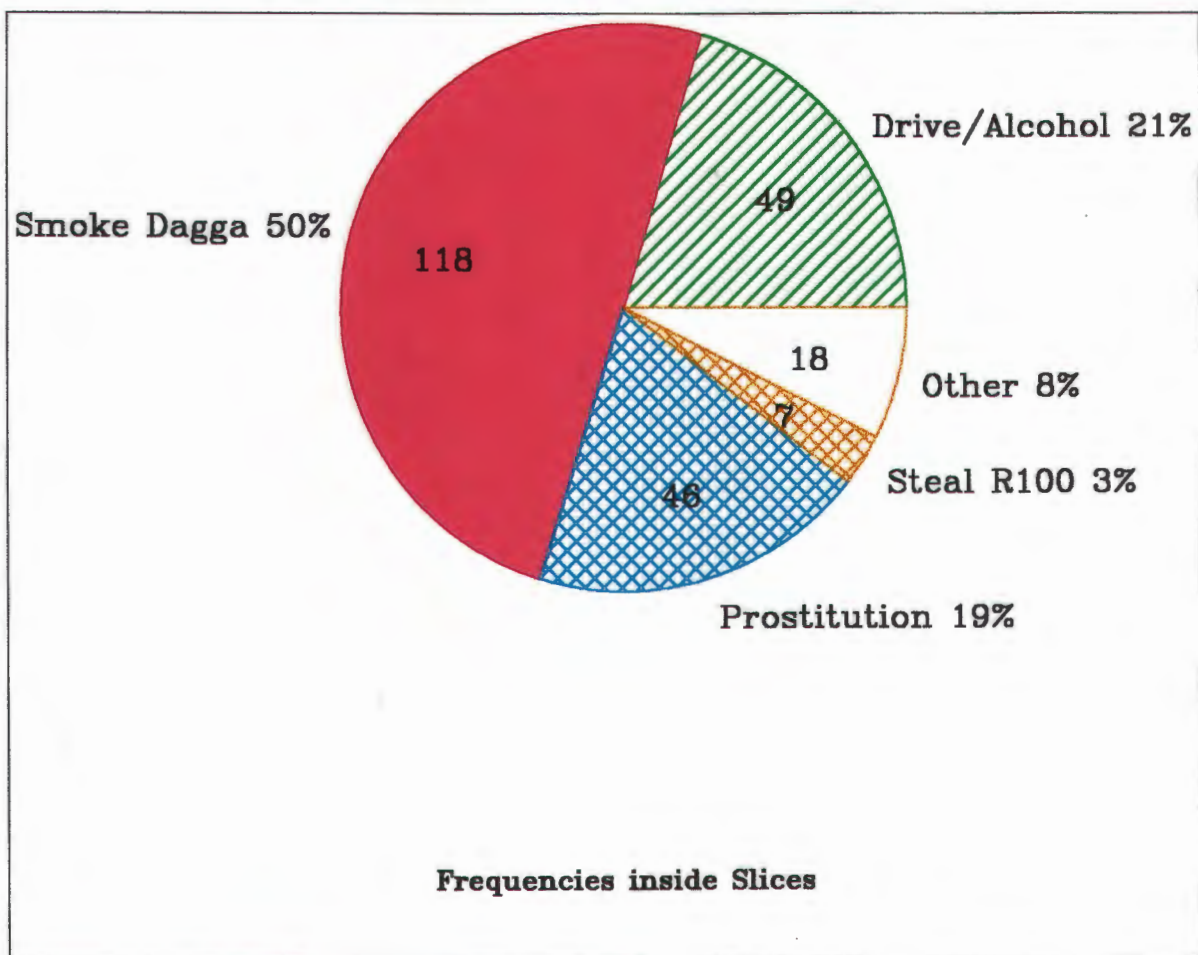


**Sentence 3: prison 6-11 months**

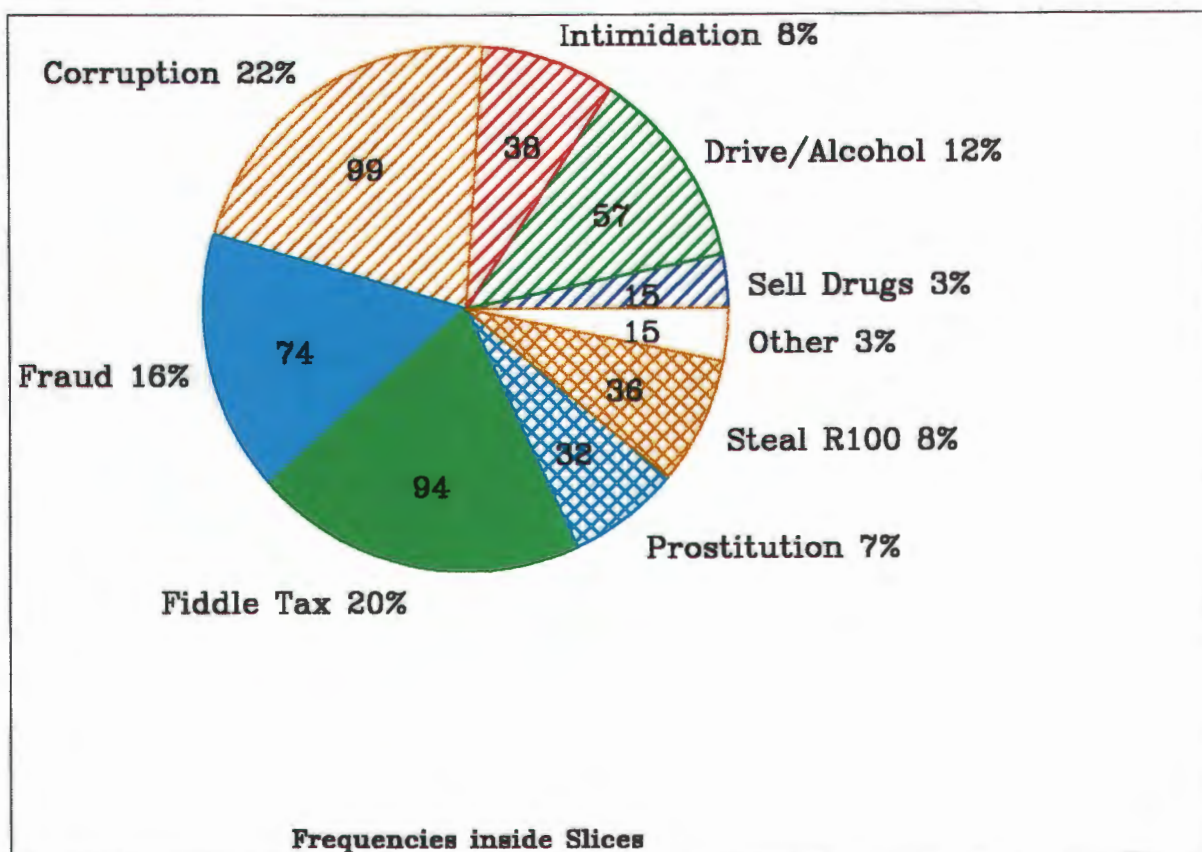




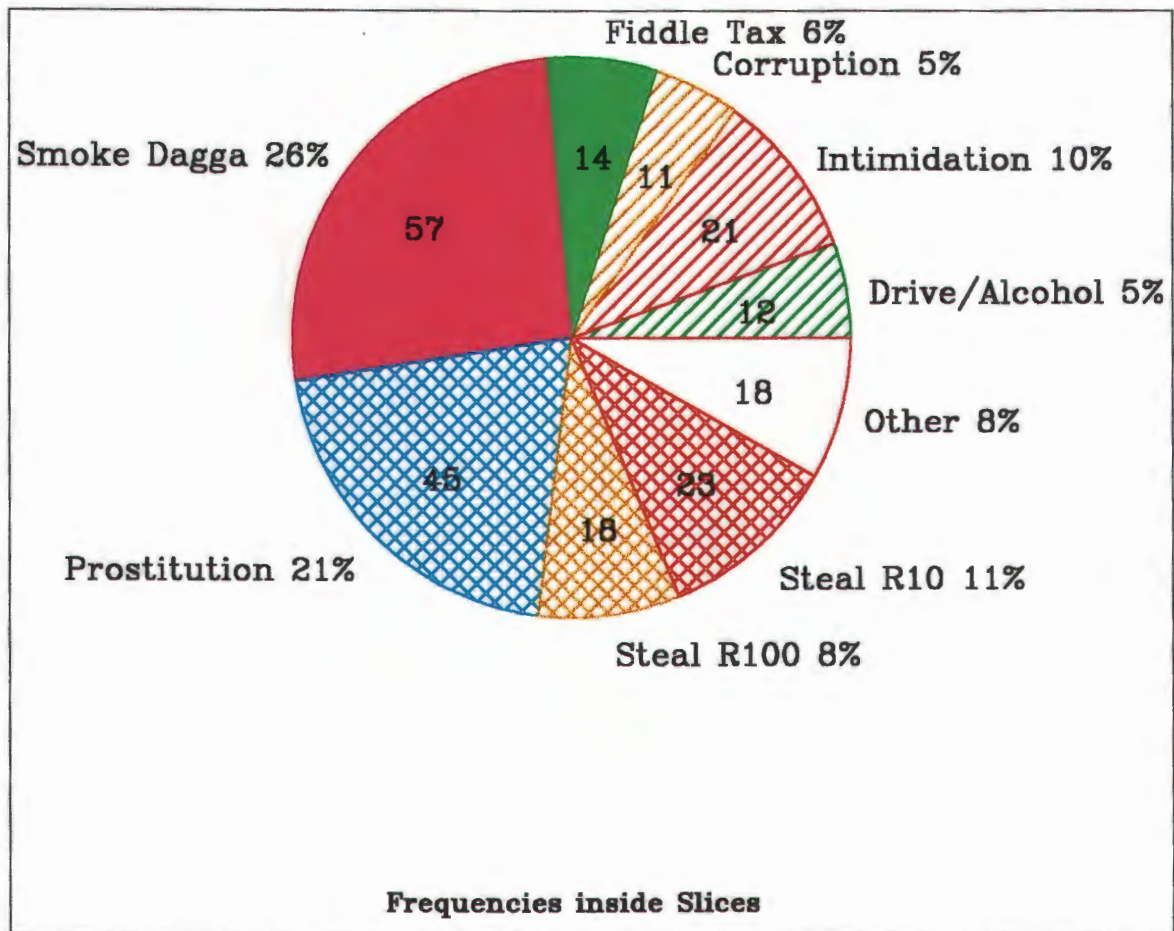
**Sentence 14: committal to an institution**



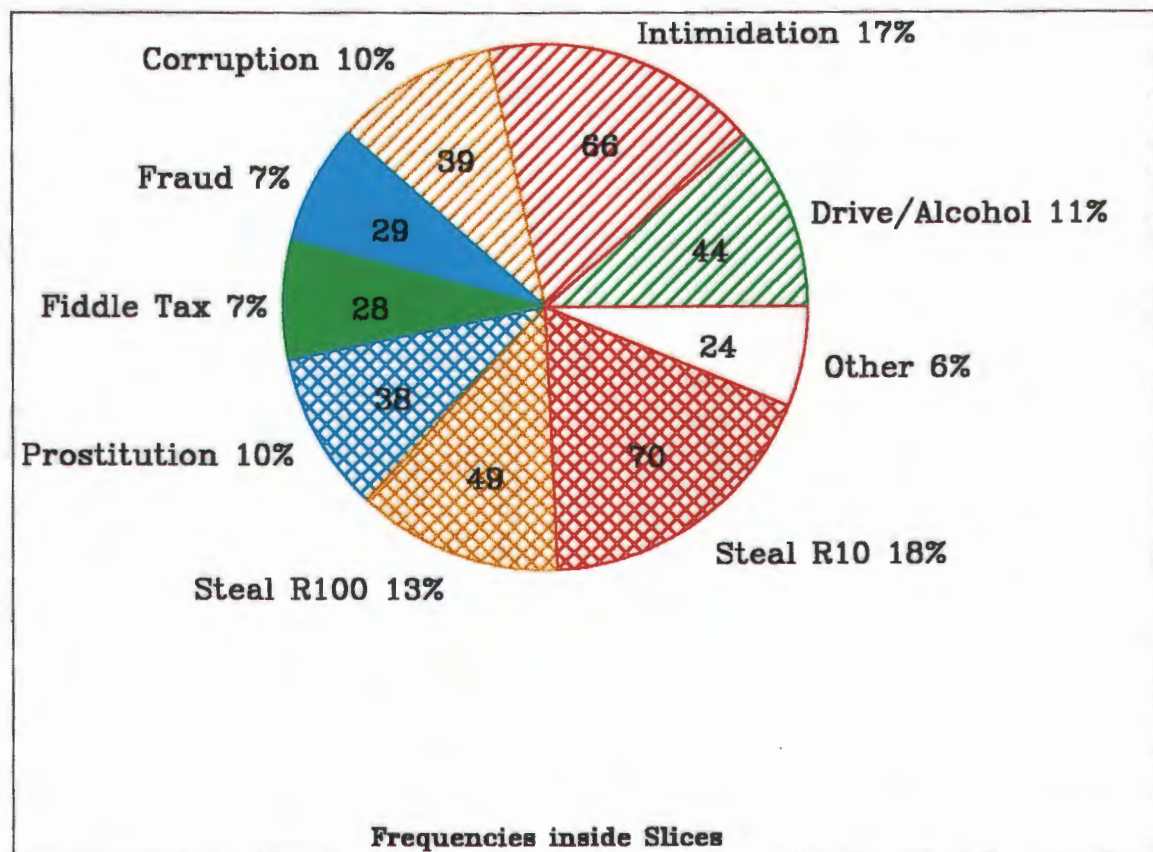
**Sentence 19: fine of R600+**



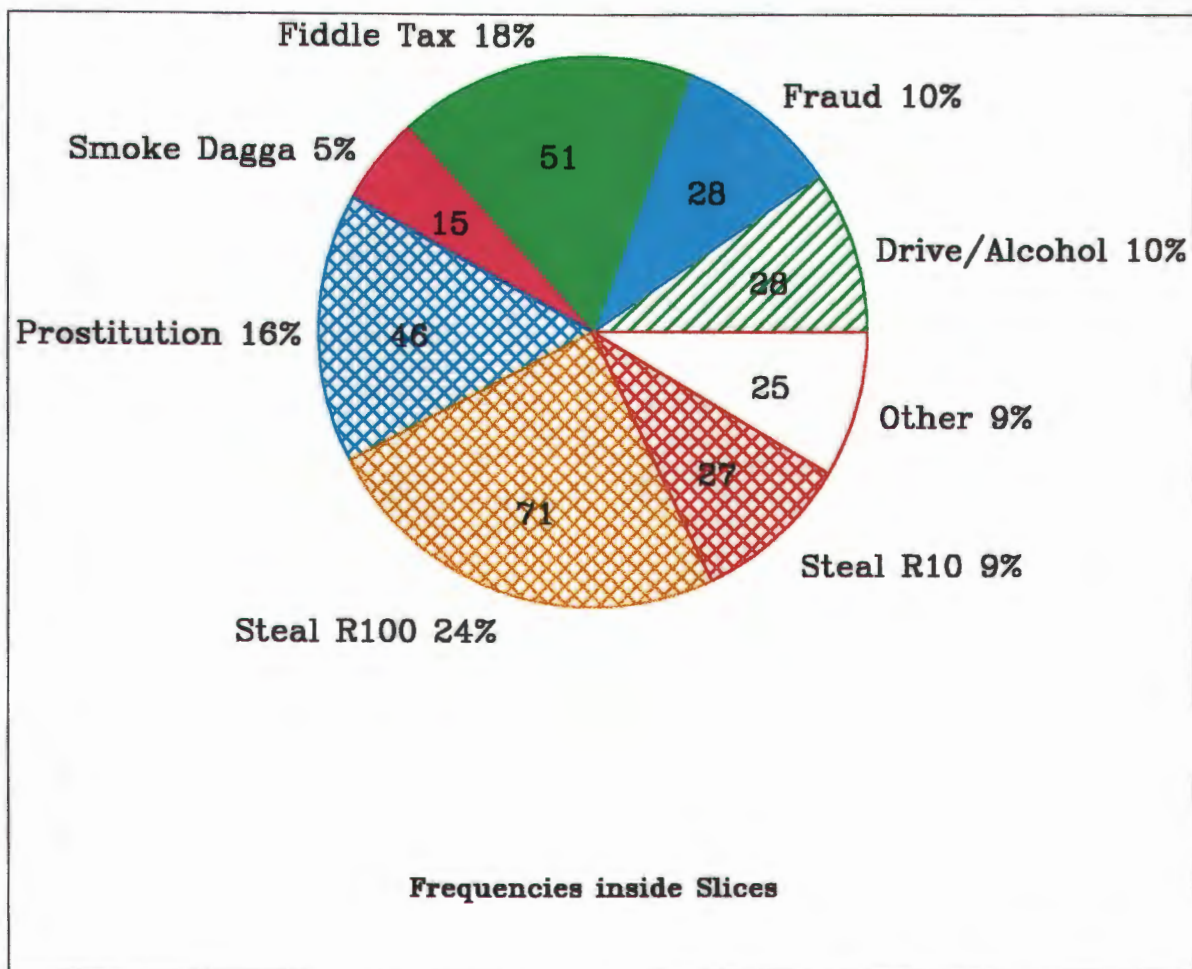
**Sentence 21: correctional supervision**



**Sentence 23: suspended sentence**



**Sentence 18: fine of R100-500**



## **CHAPTER 7**

### **SUMMARY OF THE RESEARCH FINDINGS AND RECOMMENDATIONS**

## **CHAPTER 7**

### **SUMMARY OF THE RESEARCH FINDINGS AND RECOMMENDATIONS**

#### **7.1 OVERVIEW**

In the first section of this, the final chapter of the study, the previous six chapters are precised in order to draw through the argument for public involvement within the sentencing forum in South Africa. Chapter 7 makes various recommendations concerning crime prevention and sentence options and once this has been achieved, important areas of the thesis relating to crime prevention as a form of diversion (defined by Snyman 1996:103 as "the channelling of cases to non-court institutions, in instances where the cases would ordinarily have received an adjudicatory hearing by a court"), are debated. In this respect the chapter searches the Dutch method of composition in order to argue that, South Africa's diversionary platform may benefit from the inclusion of a like method. As Snyman (1996:103) argues "...society is moving toward diversion from the criminal justice system when [such a] procedure appears best for the individual and does not endanger the public safety".

It is variously postulated that diversionary methods keep prison numbers down, reduce costs in all judicial areas - for example police and court time, and most importantly provides a form of crime prevention whereby the offender is given what can be argued to be a "second chance". However, this chapter suggests that the diversionary methods utilised within South Africa do not go far enough towards the "second chance" criteria. Whereas in South Africa the offender still has to appear before some type of panel for judgement, the Dutch system is shown to avoid even this brush with officialdom and is, therefore, argued to be a superior method of preventing crime.

The chapter then moves on to briefly consider other diversionary methods of crime prevention, for example the American sanction of "probation without verdict" and the newly devised plan within the United Kingdom to re-establish the elements of shame and stigma to being punished. The idea here, is that if offenders can be made to feel ashamed of their criminal activities, the public stigma engendered by being punished can provide a useful tactic in the area of crime prevention. Stigma is argued by the British Home Secretary, Michael Howard, (in *The International Express* Wednesday September 11 1996:9) to be the reason why the Japanese maintain their low level of crime - they stigmatise both the offender and the offender's family by naming the perpetrator and publicly documenting the



crime. In the case of the juvenile offender Howard's plan would mean that both the offender and the offender's family are seen as responsible for any misdemeanour which occurs, with the resultant shame felt by all parties. In the case of adult offenders, this method is shown to be more interesting because it rather refutes the contemporary element of anonymity brought to the fore by the influence of the individual human rights movement in (in this instance) court proceedings.

Section 8 [p.247] justifies the research theme (hypotheses) in terms of the research undertaken.

In the penultimate section of the chapter subjective consideration is utilised to provide a sentencing guide for South Africa based upon the research findings, and the chapter concludes with a motivational suggestion that further research be undertaken in the field of public input into sentencing and penal policy within the country.

## **7.2 THE CHAPTERS**

### **7.2.1 Chapter 1: Introduction**

Chapter 1 unpacked the contemporary debate surrounding judicial sanctions, and motivated for the inclusion of public wishes within the sentencing forum in South Africa. Using correlative ideas from the United Kingdom (U.K.) and the United States of America (U.S.A.), the debate variously looked at the inherent justification underlying the British Crime Survey[s] (BCS) and The National Survey[s] of Crime Severity in the U.S.A., to show that survey research has a role to play alongside the official crime figures in South Africa. And, furthermore, that such surveys are a necessary integral constituent of research further afield, for example the United Nations Interregional Criminal Justice Research (UNICRI) Institute, which attempts to provide a global picture of crime. Crime surveys involve the public in documenting crime and provide a more rounded picture of both the amount and type of crime in society, and, they are invaluable in assessing victim harm. In this respect the chapter argued that, as far as can be ascertained, the South African public have, until very recently, not been given the opportunity to make their wishes known concerning penal policy in the country.

The chapter identified several world-wide areas of concern within the contemporary judicial arena, for example the general rise in violent crime, the public call for harsher sentence, prison overcrowding and the general lack of resources to cope with increased violations and internment. These areas of concern were briefly debated in order to provide a solid foundation on which to build the study.

Chapter 1 then moved on to a concise discussion of the reforms taking place within the sentencing forums of the U.K. and the U.S.A. and highlighted the difficulties involved for both countries in bringing to fruition their need to invoke a sentencing policy which directs offenders away from internment, what Davies (1993:3) called the "...new penal era of community-based intermediate sanctions...". The chapter argued that these "difficulties" are more acute in the case of South Africa, where support structures are less well developed.

The chapter justified the thesis undertaking by discussing the motivation for public involvement, firstly in terms of democratic sovereignty and secondly, in relation to the benefits of equalising responsibility between the lay public and the penal justice system. In the first instance, it was variously shown that judicial legitimacy rests upon universality, what Adinkrah (1991:230) said is a need for the realisation that authority and the distribution of power in penal matters can only be successfully achieved when they are seen to "...[reflect] the basic values of the individual citizen" of any state. Whilst in the second instance, concern for the victim of crime was shown to be more usefully addressed when knowledge of the amount and type of crime in society is better known and when victims have a chance to take part in punishment procedures. Both justifications involve the public in one way or another. Therefore, the chapter argued that only when crime is recognised as a social problem which requires a shared responsibility by all, can the effects of crime, or its remedies, be more successfully addressed.

Chapter 1 gave consideration to the aims and rationale of the study, the research methodology (including questionnaire design and questionnaire format), looked in some depth at the sampling procedure, provided research hypotheses and defined key concepts. In this respect the chapter offered two annexures ("A" and "B") which gave further details on: the questionnaire, the selection of sampling units, the sample frames, the method of statistical analysis, fieldworker training and the fieldwork undertaken. The chapter also briefly introduced the various chapters which make up the study as a whole.

### **7.2.2 Chapter 2: Historical theories of punishment**

Chapter two set out to discover the theoretical schools of thought which were argued to have informed global sentencing policies. The chapter looked in some detail at the influence of the Classical, Positivist, neo-Classical and Utilitarian schools of thought, and documented their historical development. The chapter then moved on to consider the human rights movement in relation to the work of the United Nations (U.N.) and the development of The United Nations Interregional Crime and Justice Research Institute (UNICRI), juxtaposing the inherent theoretical ideals of human rights with the idealism of the schools of theory earlier identified. The ensuing debate indicated that there has been a

change in theoretical standpoint, and that this change (which is argued to empower the motivation for public input into sentencing decisions) is now influencing the principles of modern sentencing practice, rather than theoretical ideology.

With this change in mind, the chapter discussed the aims of punishment by using the work of, amongst others, Cohen (1981) on the development of scientific theory, Young (1981) on the Enlightenment thinkers, Soma (1982) on retribution, Van Der Merwe (1991) on the justification for and purpose of punishment and Nicholson (1992) on positivist ideology. The debate was brought up to date by looking at the human rights mandate and its influence upon sentencing. The change between theoretical standpoints, identified earlier, was noted to revolve around societal rights as opposed to individualised rights and it was suggested that contemporary sentencing policy stands at something of a watershed: on a line between collective versus individual rights. An indication was given that both individual and collective rights - although appearing as polemics where never the twain shall meet - are in fact imbued with the same idealism, and it was argued that the promotion of the rights of one specific individual often detracts from the rights of others. In this regard the discussion indicated that rights cut many ways - for example the offender in society has rights and so does the victim - and made the point that all such arguments are embroiled within what the chapter calls a "moral maze".

Taking the Dutch Code of Criminal Procedure, and in particular, police apprehension and remand detention in the Netherlands as an example, the chapter attempted an evaluation of the effects of the human rights organ on a specific criminal code. Change once identified was related backwards to Classical thought, thence forward into the South African Constitution. Using the case of *Makwanyane and another* (1995(2) SACR 1 (CC)), the effect of the human rights mandate upon the South African Constitutional Court was highlighted.

Chapter two then took up the debate surrounding the aims of punishment in terms of retribution, deterrence, rehabilitation and crime prevention. The chapter discussed, amongst others, the work of Lord Longford (1991) on retribution as a form of reactionary vengeance, Cross and Ashworth (1991) on deterrence as a threat or example of punishment which aims to discourage crime, Kuhn (1993 in The U.N. world crime survey report) on the punitive aspects of deterrence, and Tonry & Zimring (1983) on the dehumanising elements of correctional institutions as a foiled means of rehabilitation and prevention of crime. The theoretical discussion was then transported into the criminal justice systems of the United Kingdom and the United States of America where, using the work of Thomas (1980), Cross & Ashworth (1981), Faulkner (1993), Doob (1993) vonHirsch (1993) and others, it was shown that two very different justicessystems have arisen in response to theoretical influence. In

this respect, Lowe (1987) was indicated to argue that there is a general lack of consensus on sentencing theory and purpose which forces the realities of sentencing to admit the presence of an un-complementary theoretical platform.

### **7.2.3 Chapter 3: Punishment in South Africa**

Chapter three historically searched the emergence of the Union of South Africa and the formation of its legislature. The chapter began by utilising the ideas of Van Der Merwe (1991) to note the inherent gap between the theoretical discipline of criminology and substantive criminal law. Whilst indicating the need for co-operation between the two fields - which takes up Van Der Merwe's contention that both fields are dependent upon each other - the study was firmly located in the realms of criminology as having to do with statistical methods of measurement and prediction, rather than what Van Der Merwe terms the clinical approach of the criminal law which relies on expert experience and judgement.

Using the work of Hahlo & Kahn (1960) and du Plessis & Kok (1981), chapter 3 traced the blending of common law and statute in South Africa between Roman-Dutch and various other influences, for example English, German and French law. A note was made of the provision for the inclusion of public wishes into Roman law through the codification of the Law of the Twelve Tables (*Lex duodecim abularum*); thereby upholding the perceived right of the people to make their wishes known within the law making forum.

Chapter 3 moved on to address the basis for authority of law in the country, and here it was shown that the authority within South African courts emanates from various sources. It was indicated that these various sources inculcate an ideological doctrine which permeates authority and the ideas of Nicolson (1992) were taken up in order to debate the definition of ideology.

Defining three broad types of ideology, Nicholson's ideas concerning judicial idealism were used in the chapter to suggest that the application of law in South Africa falls within the realms of judicial positivism. Briefly, judicial positivism was indicated to be a form of instrumental morality which applies the rule of law (in relation to facts) and thereby can be argued to dilute the law of nature or the morality and values inherent in common law: noted in chapter 3 as tantamount to a failed understanding of authority. The debate interrelated various ideas from chapter 2, looked in some depth at Van Der Merwe's discussion on morality and the law, and debated the notion of constitutional democracy in relation to the South African Bill of Rights.

Chapter 3 then moved on to suggest that concepts like ideology, morality, democracy, legitimacy and accountability of the law, are nothing more than meaningless jargon unless all citizens within a particular state are satisfied that they personally are represented. It was argued that such an idealism is not possible unless the judiciary are at one and the same time perceived to be independent of state control and representative of the people they serve, and it was noted that such a balance is crucial if anything akin to a truthful democratising ethic is to materialise in South Africa. Note was made of the inherent problems involved with balancing in relation to Nicolson's ideas on how to overcome the accountability aspect in terms of the responsiveness of a Bill of Rights. It was shown that Nicolson maintains that to be regarded as legally pertinent, judicial accountability has to draw on the views of non-legal experts, like for example social scientists. Judges, he says, need to become prepared to consider information and arguments other than those traditionally regarded as legally relevant.

Finally, chapter 3 took up the debate concerning theoretical influences on the judicial forum in South Africa and noted that, in spite of how the law functions[ed] in the country (in terms of state criteria or individual good), the problems experienced within penal administration in the country can be likened to other criminal justice systems. Sentencing policy, backed by theoretical ideology, has managed to overstep correctional facility accommodation and has led to exceptional overcrowding within prison systems globally. It was shown that overcrowding is one of the major justifications for the world-wide call for a reformed sentencing policy. The chapter highlighted the main points of issue concerning indeterminate versus determinate sentencing decisions in relation to overcrowding, and looked at the effects of indeterminate/determinate sentencing decisions in relation to concepts like liberty, inequality, proportionality, fairness, judicial autonomy and discretion etcetera, whilst noting that the public call is for a return to a more determinate get tough model of sentencing.

#### **7.2.4 Chapter 4: An evaluation of the different forms of punishment**

Chapter 4 took up the aspect of prison overcrowding and, further, the public's call for more internment (harsher sentence), to evaluate alternative sentencing options. The chapter began by assessing the overcrowding problem with reference to the research of, amongst others, Parker et al. (1989) in the United Kingdom, Lowe (1987) and Koehler and Lindner (1992) in the United States and Bruyn (1993) in South Africa. It was shown that these jurisdictions, and indeed many others, report high yearly rises in prison numbers with most authors admitting that prison overpopulation is a long term problem without a short term answer.

Chapter 4 moved on to look at specific sanctions and tried to assess their potential in terms of success and failure with regard to both the aims of punishment and public protection. The chapter utilised the work of Davies (1993) on imprisonment as labelling and noted that internment tends to confirm offenders as criminals providing them, in many cases, with new criminal skills, and Koehler and Lindner (1992) and Bruyn (1993), on the financial burden of incarceration. In opposition, the ideas of McCarthy & McCarthy (1991) were juxtaposed to show that alternative community-based correction is a cost-effective punishment option, which although often held up to criticism by the public who tend to see it as a "soft option", has many positive elements to offer (see later discussion).

Chapter 4 then discussed various alternative forms of punishment. Beginning with the fine the ideas of Brody (1975), Terblanche (1993) and Van Der Merwe (1991) were debated in order to argue that the fine is a successful form of punishment in its own right which is under-utilised by the judiciary. It was shown that the fine is an individualised sanction which is effective because, according to Van Der Merwe (1991), it does not suffer from the pure revenge aspect of retribution and according to Brody (1975), is not only disagreeable in itself but has the added advantage of leaving the threat of a potentially more unpleasant penalty for a subsequent offence. However, in terms of the success/failure criteria, chapter 4 argued that whilst the fine is seen as a cost effective punishment option which can successfully be set to provide a punishment which is felt by the offender, the fine does not have much of a denunciatory effect.

Next, chapter 4 debated the probation order. Using the work of Thomas (1980) on the probation order versus the tariff, Van Der Merwe (1991) on the conditions of the probation order and Koehler & Lindner (1992) on the type of offender sentenced to probation, it was indicated that the probation order has become a very popular form of punishment for various offenders and various offences. For example, Koehler & Lindner said that in the U.S., whereas the probation order used to be a punishment which was reserved for the non-violent or minor first time offender, it is now utilised for adult persons who are convicted in the superior court of felonies - hence the term, felony probation in that country. Likewise, it was shown that in the U.K. probation is more and more utilised for all types of offender and offence, and is often handed-down by the courts along with a second (different) sanction, to make up what was termed a "mixed sentence": in other words a sentence which one may say is purpose fitted to a particular offender and a specific criminal act.

In terms of success/failure criteria, chapter 4 noted that the success of probation lies in its ability to allow offenders to retain their life links: job, family, social life etcetera. Such a retention means that there are far less reintegration problems (a major problem with

incarceration). Probation, by promoting the retention of social links, also affords the offender something of a protection from the stigma involved with having done wrong and this in turn allows an offender, to some extent, to retain self-dignity. The chapter made note that the promotion of social links and self dignity can provide a form of crime prevention.

The inherent failures with probation were shown to be threefold. Firstly, in the case of South Africa, the lack of support structures in many areas of the country mean that the probation order is not a viable punishment option. There are just not enough probation officers and staff to police the order once it is handed down. Secondly, it was argued that the costs of a probationary service are not at present sufficiently met by government in the country. Thirdly, and most importantly, the very real problem of overcrowding within probation was highlighted and Koehler & Lindner (1992) explained how prison crowding has had a hydraulic effect on probation, resulting in unprecedented increases in the probation population.

Community corrections were looked at in relation to the work of Duffee & McGarrell (1990) on diverse programmes, Bruyn (1993) on community correction for those offenders who do not pose a problem to the community, and Brody (1975) on the difficulties of tailoring community punishment programmes - what he explained as meaning that sentencers have a multi-faceted mosaic of options which they fit to the offender, rather than to a particular punishment ideology. The chapter noted that in South Africa, community-based sentencing options fall under The Department of Correctional Services, but one should be reminded here that community orders in South Africa are little used: a mere 22 percent of all sentences handed down by South African courts (Naude et.al. 1996:14).

Chapter 4 then undertook a discussion of the contemporary debate surrounding the death penalty and it was shown that, although in South Africa the penalty of death was declared to be unconstitutional on the 6th June 1995 by the Constitutional Court, 56 percent of the survey population within the study call for the death penalty for the crime of murder and 25 percent call for the death penalty for the crime of rape. Using the work of Cowling (1993), Van Der Merwe (1991 & 1996) and the ruling of Justice Chaskalson, the chapter unpacked the debate on the death penalty in South Africa with reference to the case of *Makwanyana and Another (1995 (2) SACR 1 (CC))*, and the prior judgement of the Constitutional Court concerning the broad interpretation of fundamental rights in the case *S v Suma (1995 (2) S.A. 642 (CC))*. Bearing in mind the courts decision on the unconstitutionality of the death sentence, chapter 4 indicated that the success of the death penalty - the retentionist argument - was that; the public support the death penalty (upheld by the research), that it provides a punishment which offers permanent incapacitation, that it



achieves a non-comparable deterrence effect and that, in many cases, for example prison murder, there is just no alternative. The abolitionist argument was shown to revolve around; the possibility of judicial error, the perceived lack of deterrence, its cruelty, the infringement of human rights and its arbitrariness.

As a means of placing the death penalty in perspective with the discussion on alternative sanctions, the chapter looked at the costs involved in actually putting an offender to death. Using the work of Keve (1992) it was noted that, in spite of the retentionist's argument that society should not be expected to pay out large sums of money to keep a convicted death penalty offender incarcerated for life, the actual cost of enforcing the death penalty supersedes the costs involved with a prison sentence of 40 years.

Chapter 4 moved on to look at corporal punishment (whipping [cuts]). It was indicated that, although according to Van Der Merwe (1991), corporal punishment had long fallen from favour within South African courts, as part of the law statute at the time of the research, something needed to be said concerning this sanction. Once the method had been defined, and the Constitutional Court's ruling on the unconstitutionality of adult whipping had been located in the case of *S v Williams* (1995 (2) SACR 251 (CC)), it was noted that many of the arguments involved with the death penalty applied to corporal punishment, for example that it was an inhumane and degrading form of punishment. The chapter noted that notwithstanding the unconstitutionality ruling, the success of corporal punishment was that it provided a means of punishment which could keep an offender out of prison, particularly in the case of a juvenile or first time offender. The failure of corporal punishment was located in the area of pure retribution which provided no rehabilitative element, and which, according to Van Der Merwe (1991), smacks of a violence which begets violence.

Chapter 4 then variously took up the publics' choice of sentence, looking firstly at the UNICRI research in this area and then at the research of the British Crime Survey. From the UNICRI research, the amount of crime in South Africa was discussed and it was noted that, six out of one hundred persons in S.A. could expect to become victims of crime or offenders every year. It was indicated that during the period 1987 to 1991, violent crimes have increased by 10 percent, murder by 39 percent, robbery by 35 percent, rape by 15 percent and aggravated assault by 2 percent. In response to this crime position, the chapter reported that in developing countries like South Africa the public tend to favour imprisonment twice as much as industrialised countries: 57 percent and 22 percent respectively. In line with this argument the British Crime Survey showed that the British public favour non custodial punishment sanctions more than imprisonment, except in the

case of personal nature crimes. Pease (1988) is noted as saying that as a generalisation there was (in the BCS statistical analysis) a marked difference in preferred action according to crime type with the survey population tending to respond in a more extreme way to personal crime as opposed to property crime (a tendency upheld by the research to hand).

#### **7.2.5 Chapter 5: Respondent fear of victimisation and seriousness scores for specific crimes**

Chapter 5 unpacked the research findings from sections A and B of the questionnaire and looked at the demographic profile of the survey population, respondent fear of victimisation and seriousness scores for specific crimes. Statistical analysis was provided within the chapter in the form of tables and figures which highlighted respondent's seriousness scores in relation to the research findings of Naude et.al. (1996) in South Africa, the work of Pease (1988) and the British Crime Surveys, and other crime research.

Highlights of the survey findings on seriousness scores showed, amongst other things, that there is agreement on which crimes are the most serious. For example, it was noted that Whites and Coloureds ranked murder first whilst Blacks and Asians ranked rape first. The most educated respondents tended to score crime seriousness more conservatively than other sub-groups. Whites were shown to fear rape and theft, Blacks robbery and housebreaking, Coloureds housebreaking and Asian were noted to be more fearful of theft. However, cross correlations showed that actual victimisation rates were lower than the scores provided by respondents against the likelihood/fear of crime, pointing to the fact that the fear of crime is more prevalent than the actuality. Chapter 5 also indicated that females and older respondents feared crime the most, although, once again, these groups were noted to have been victimised no more than other sub-groups.

Concerning the question on input into sentencing of offenders, the chapter indicated that 72 percent of the survey population wanted to be involved with sentencing. The highest positive scores came from the Coloureds, females and the older age group. Cross calculations of input into sentencing with victim/non-victim likelihood/fear of crime, showed that larger proportions of those with high expectations of becoming a victim recorded in the positive, but the differential was relatively small: 76 percent victims, 69 percent non-victims.

Chapter 5 motivated the division of the 22 crimes into two sub-groups relating to what was termed general and specific nature crimes, in order to offer correlative comparison with various findings from the British Crime Survey. The chapter argued that, like respondents taking part in the BCS, South African respondents clearly define seriousness in relation to victim harm. It was noted, that crimes which involved physical victim harm, for example

murder, drinking and driving whilst over the alcohol level causing the death of an innocent victim, rape and terrorism, consistently recorded higher seriousness scores than the lesser (secondary) victim harm crimes, for example prostitution and housebreaking. Overall, Coloureds and the least educated were noted to provide higher seriousness scores than other sub-groups.

## **7.2.6 Chapter 6: Respondent views on sentencing, mitigating factors and decriminalisation**

Chapter 6 unpacked the research findings from sections C and D of the questionnaire and looked at respondent sentencing preferences, mitigating factors and the concept of decriminalisation. Statistical analysis was provided within the chapter in the form of tables and figures pertaining to sentence choice. The chapter initially discussed respondent sentence choice in relation to the general/specific nature sub-group crimes identified in chapter 5, thereafter re-grouping the 22 crimes into three sub-categories termed bodily harm crimes, secondary harm crimes and property crimes, for more meaningful interpretation. Where possible, comparison between the seriousness scores in chapter 5, the findings of Pease (1988) from the British Crime Survey, and other research findings was undertaken.

Looking first at the general nature crimes, respondents tended to choose imprisonment for those crimes which involved the physical harm of a victim, for example the crime of mugging or attack by strangers, whilst non physical harm crimes, for example stealing a car for a joyride or fiddling income tax, attracted less imprisonment and more sentences of fines/institutionalisation. Primarily, the institutional type sentence appeared more popular for what the chapter termed "self harm" or "choice factor" crimes, for example prostitution or the smoking of drugs. The specific nature crimes were dealt with more harshly by respondents with long imprisonment terms and the death sentence featuring for the most severe crimes, for example murder, drinking and driving over the alcohol level and causing the death of an innocent victim, rape and terrorism. Overall, Blacks, the younger respondent and the least educated consistently favoured imprisonment and Whites favoured the death sentence more.

Utilising the 3 sub-groups of bodily harm/secondary harm and property crimes, chosen sentences were shown to correlate with perceived seriousness. Of note was the high call by respondents for the death sentence for crimes which were considered the most serious, i.e., murder, rape, etcetera, as compared with the diversification of sentences provided for the secondary harm crimes. Both bodily and secondary harm crimes were noted to provoke sentences of decreasing severity as victim harm decreased, but highlights showed that the

bodily harm crimes invoked the sentence of imprisonment more than the secondary harm crimes. Overall, once again, Blacks, younger respondents and the least educated appeared to opt for imprisonment and Whites and older respondents favoured the fine and other sentences more.

Considering mitigating circumstances, respondents tended to take what might be termed the "common sense" approach with harsher sentences being advocated for prior record offenders, lighter sentences for offenders under 21 or over 60 years of age, and, despite the literature argument that females are treated differently by the courts because of gender, the "makes no difference" option was recorded most for female offenders.

Overall, respondents were not in favour of decriminalisation. Decriminalisation of prostitution, the possession of dagga and abortion received high scores in favour of retention as culpable crimes (in spite of the subsequent legalisation of The Termination of Pregnancy Bill in February 1997). More leniency was shown by recorded scores for the decriminalisation of gambling and homosexuality/lesbianism, with the overall bias tending towards decriminalisation.

To continue, as intimated in the introduction to this chapter, Chapter 7 now takes up the debate on diversion as a means of preventing crime.

### **7.3 DIVERSION: a crime prevention method**

#### **7.3.1 Discussion**

According to Buckland (1996:In Weekend Review, International Express, September 18), President Nelson Mandela has expressed his worries publicly concerning the upsurge of crime in South Africa, saying that criminals were out of control and warning that if people started taking the law into their own hands (Pagad in the Eastern Cape is just such an example [see also endnote 1, p.247]) "...then the social fabric [of society] is breaking down". Buckland says that:

*South Africa's parliament has started to rush six tough anti-crime bills into law, targeting drug-dealers and gansterism...[and he indicates that]...[R]emarkably, there were cheers from the cohorts of the African National Congress..., when during a crime summit, the Minister of Justice Dullah Omar said the Government was reviewing its opposition to capital punishment.*

Buckland suggests that "This turnaround is...stunning...so ingrained is the ANC's detestation of judicial killings after [the] apartheid years when more than a hundred, mainly

black, South Africans were executed annually. He further suggests that "The fear that causes such a change of heart comes from acute anxiety about personal safety...", the cold facts of which amount to the situation whereby:

*...two million crimes were reported last year (1995) - including 36,888 rapes, 18,983 murders and 66,838 armed robberies...Whites and Blacks alike are only too aware that... [an] insidious threat faces South Africa....The danger of the economic foundations of the state being undermined by common criminals who find life so cheap that they will take one in exchange for a mobile phone.*

This perceived turnaround has, however, once again been thwarted by Mandela himself, and this in spite of a 95 percent vote in favour of retention of the death penalty.

Various throughout this study, mention has been made of the need to find ways to address the increase in violent crimes in South Africa, and indeed, further afield. New forms of crime addressal must be found which do not add to the overpopulation of correctional institutions, and yet, at the same time, provide the public with the reassurance that their personal safety is not threatened and that something is being done. Concerning prison overpopulation, innovation is to the fore. In South Africa there is talk (however unacceptable to certain levels of society, for example human rights advocates), that disused mines may be converted into prison space. And, in the United Kingdom, the arrival from America of The Resolution, (see endnote 2 [p.247]), the first floating prison to be used in Britain since Victorian times, heralds the winds of change in this area. Whilst in the area of sentencing, one of the methods used by the South African judiciary is diversion, defined earlier by Snyman (1996:103) as:

*...the channelling of cases to non-court institutions, in instances where the cases would ordinarily have received an adjudicatory hearing by a court.*

### **7.3.2 The goals of diversion**

According to Snyman (1996:106) the goals of diversion are:

- \* To provide the criminal justice system with a more flexible approach than does the traditional process in order that the system may be more responsive to the needs of the defendants and society and may preserve its energies to effectively process cases that would be more appropriately handled through the adversary system;
- \* To provide defendants with an opportunity to avoid the consequences of criminal processing and conviction;

- \* To help in deterring and reducing criminal activities by offering to the defendant the necessary opportunities to affect such changes as are necessary;
- \* To allocate available resources to keep the criminal justice system running at an optimum level;
- \* To allow alleged offenders to maintain the responsibility and burdens of making decisions and managing one's own life;
- \* To permit the individual to provide for him/herself through employment; and
- \* To permit the individual to make restitution to the victim.

Snyman (1996:107) makes note that in South Africa at the present time there are two diversion programmes for adults and several programmes aimed specifically at the juvenile offender. For adults there is the correctional supervision programme (implemented on 15 August 1991), and the parole supervision programme which, as the title implies, supervises released offenders during the remainder of any portion of community service sentence recommended by the courts at the time of sentence.

She indicates that five legal changes have taken place recently (1995/6) in South Africa concerning the policy of diversion in the country, dealing almost entirely with the juvenile and covering such areas as:

- \* restrictions on detaining the under 18s in a police cell or lock up (a situation which Snyman [1996:108] says has plunged juvenile justice in the country into crisis);
- \* assessment centres where the under 18s are seen by an official to decide on placement (this project Snyman [1996:108] says is suffering from a lack of places for juveniles to be held awaiting trial);
- \* on 9 June 1995 the case of *S v Williams* 1995 (3) S.A.632 (CC) found whipping to be unconstitutional (already noted above);
- \* ratification of the Convention on the Rights of the Child by the South African Government in June 1995, which ratification made diversion for the under 18s the goal of juvenile justice;
- \* the implementation of a child and youth care system under The Ministerial Committee on Youth at Risk (1996:108).

Snyman (1996:109-110) identifies two types of juvenile diversion, viz., police cautioning and what she terms "second tier diversionary measures". In the first instance police cautioning as a means to divert juveniles away from the judicial forum, provides the police service with discretionary powers to dispose of cases on an informal basis, whilst "second tier" diversion involves prosecutorial sanctioning and family or group conferencing. Snyman (1996:110)

argues that as second tier sanctioning does not replace formal proceedings and is not as easily undertaken as cautioning, "...juvenile justice reform in South Africa should be aimed at first tier diversion: warning and cautioning by the police".

The second type of juvenile diversion is identified by the author to be Nicro's YES (Youth Empowerment Schemes) diversionary programmes - a 3 year plan for youths at risk which involve either short or long term interventions. All programmes within this scheme aim to encourage young offenders to take responsibility for their lives by providing them with life skills; skills which not only endeavour to equip them for future employment, but also encourages them to serve others and the community as constructive citizens. In this way the YES schemes aim to engender dignity and self esteem in the youth of South Africa.

However, as worthy as such efforts are, South African diversion smacks of official intervention and this is where it can be argued that there is a failing. Snyman is not unaware of this negative aspect of diversion programmes. She indicates several criticisms in this regard and notes what can be argued to be the crux of the problem:

*...diversion [can serve] to aggravate rather than deter...[T]he fact that a person received intervention service, regardless of whether the service was in a traditional justice setting or in the diversion agency, resulted in higher levels of perceived labelling...[and suggests that]...a large proportion of...programmes are coercive rather than voluntary." (1996:113).*

It is proffered here that there is a better way to divert offenders from the "para-official" arena which can at one and the same time provide, a superior method of crime prevention because it appears to encompass a truthful empowering: the individual is given the chance to take responsibility for actions through what might be termed self-autonomy. If such a method can be initiated, the offender has a real second-chance to "make good" because they retain an autonomous accountability for their actions which is not diluted by official systems. Such a scheme exists in the Netherlands and was briefly identified in chapter 4 as "composition". It is to this scheme that this chapter now turns.

#### **7.4 THE DUTCH CRIMINAL JUSTICE SYSTEM: diversionary methods**

As noted elsewhere, according to Tak (1994) the Dutch penal code is characterised by its simplicity. In the Netherlands the judiciary have wide discretionary powers and there are hardly any statutory rules for sentencing. Tak (1994:7-8) says that the advantage of such a system is that its lack of rules allow judges to fully individualise sentence by giving full consideration to the characteristics of a crime and an offender. He indicates that:



*...[such an] asset is strongly emphasised in Dutch literature on sentencing, where it is underlined again and again that no two criminal cases are the same and no two offenders are the same....[T]he absence of mandatory rules for sentencing is one of the reasons for the mild penal climate... [in the country]....[T]his mildness is reflected in a rather low prison rate (47 per 100 000 of population in November 1992).*

However, Tak also notes the disadvantages of the near absence of sentencing rules. He says disparity of sentence is greater and this can conflict with the fundamental right that all persons shall be equal before the law and, furthermore, can cause unjustified discrepancy and uncertainty within sentencing.

So called mildness within the Dutch criminal justice system can also be found in the number of cases which come before the courts in the Netherlands. In this respect Tak (1994:8) says:

*Of all criminal cases that are dealt with yearly, only one third are tried by criminal courts. The remainder do not even get to the criminal judge, but are dealt with in the preceding phase by the Prosecution Service, either by a (conditional) waiver or by a composition - the so-called transaction - by which the accused voluntarily pays a sum of money to the Treasury to avoid a criminal prosecution and a public trial. The public prosecutor is entitled to close a criminal case officially on the basis of a composition for crimes which carry a statutory maximum prison sentence of six years.*

This way of handling criminal cases is unique and, as far as can be ascertained, can only be likened to the way in which a traffic offence is handled elsewhere. For example a road traffic accident, in which no physical harm is caused and no road traffic law has been breached (for example dangerous or careless driving), results in one party "admitting liability" (usually determined by the investigating officer at the scene) and payment to the state of a fine proportional to the determined culpability. No court appearance is necessary and the police determine the amount of fine in accordance with the perceived liability. The same method is employed elsewhere in terms of speeding tickets - culpability is admitted and the dues paid to the state. Only when there is a dispute concerning culpability, or physical injury or death, does such a traffic misdemeanour reach the court.

Taking traffic offences as an example, it can be argued that to deal with criminal infringements in this way successfully addresses the inherent overcrowding/costs problems

of sentencing identified variously within this study, and takes up many of the positive elements within the discussion on diversion, for example responsibility. But, more importantly, giving misdemeanants the autonomy to take responsibility for actions actually provides them with a fresh chance to choose right from wrong, and as such, provides a veritable force in the field of crime prevention. In this respect it can be suggested that many who make silly mistakes with little thought, given the chance to correct that mistake with no infringement to their character, i.e. no criminal record against them, would welcome the opportunity. Having succumbed once to a criminal infringement and been handed the chance to reform must offer a prime motivation for preventing a like occurrence. Snyman (1996:113), discussing the more usual forms of diversion, offers some research results which appear to uphold this motivation. She says:

*[A]lthough persons who were diverted had lower rates of recidivism than persons who received a court petition, their rates were... higher than those who were released outright without any form of service.*

#### **7.4.1 Empowerment of the prosecution service**

It was noted earlier that a major feature of present day criminal justice administration in The Netherlands is that only a small percentage of all the crimes and misdemeanours reported are actually tried by a judge. One reason for this is the realisation by the Dutch Government that funds just do not exist to process all cases through the courts. Tak (1992:680) says that "This has meant that the police have been increasingly forced...to set priorities in follow up cases so that more and more cases are not being followed through to prosecution". Secondly, Tak (1992:681) says:

*... the centre of gravity of criminal justice and sentencing has been moved further and further away from the public trial in court towards the preceding state, in which the prosecution service and not the judge is the "dominum litis". While this movement originally was driven by efforts to socialise, humanise and rationalise the administration of criminal justice, the emphasis has increasingly shifted towards the need to reduce the pressure on the justice system. One effect of this is that the prosecution service has been given more and more sanctioning powers which formerly were exclusively the domain of the judiciary.*

Here the first difference between The Netherlands and South Africa (and indeed elsewhere) is noted: "dominum litis" rests with the prosecution service and not the judiciary (explained more fully later). Basically this empowering of the prosecution services in The Netherlands means that the prosecution service decide whether or not a successful prosecution of a

particular case is possible in the first place - they make a decision on the possibility of proving guilt in the court. Secondly, the prosecution service makes a decision on "policy waiver" (which waiver can be granted conditionally or unconditionally) which is decided in terms of "reasons of public interest". Once an unconditional waiver is given, proceedings can no longer be initiated against an accused unless new evidence or objections become known. Primarily this type of waiver was little used in The Netherlands and the prosecution service were required to prosecute any case which could be successfully prosecuted, unless extreme circumstances prevented this occurrence. Tak (1992:682) relates this principle to the concept of an "expediency" clause in the old Code which, he says, can be thought of as kind of "hardship clause". Primarily, the expediency principle was only utilised if exceptional circumstances were identified whereby it was not desirable to prosecute a case. But this is no longer the case. In this regard Tak (1992:683) says:

*At the end of the sixties a remarkable change in prosecution policy took place [in The Netherlands]. Research into the effects of law enforcement and the limited resources of law enforcement agencies made clear that it is in fact impossible, undesirable, and in some circumstances even counter-productive to prosecute all investigated offences. Where up to then the expediency principle had been interpreted in a negative sense "always prosecute unless", this was replaced by the view that the prosecution service need only prosecute where this was felt necessary in the public interest.*

The change meant that interpretation of the expediency principle by the prosecution service was now linked to a vision of what Tak (1992:683) terms "the upholding of justice" rather than "the enforcement of law". In other words the principle was no longer to be interpreted legalistically. As such, decisions to prosecute in The Netherlands are now informed by a general penal policy as laid down in national prosecution guidelines and indication lists which bind the decisions of public prosecutors (save in special circumstances) to prosecute a case or not. Tak (1992:684) indicates that "In more concrete terms [special circumstances]... means that the public prosecutor can waive prosecution for reasons of public interest if for example:

- other measures than penal measures of sanctions are preferable or would be more efficacious (e.g. disciplinary or civil measures),
- prosecution would be disproportionate, unjust or ineffective because of the nature of the offence (e.g. if the offence caused no harm, it were inexpedient to inflict punishment, if it was a minor offence),

- prosecution would be disproportionate, unjust or ineffective for reasons related to the offender (e.g. his age or health, rehabilitation prospects, if he is a first offender);
- prosecution would be contrary to the interests of the state (e.g. for reasons of security, peace and order, or if new legislation has already been introduced),
- prosecution would be contrary to the interests of the victim (e.g. when compensation has already been paid).

Quite a few other forms of waiver mechanisms exist within The Netherlands, for example the procedural waiver (an unconditional waiver), the formal waiver (best thought of as a conditioned postponement) and the informal conditional waiver (which waiver always imposes conditions upon an accused which must be kept [for example that the accused commits no more crimes whilst under the informal conditional waiver]). Tak (1992:685) says that "In addition special conditions may also be imposed such as: paying compensation, making contact with a social work agency, voluntary admission to a psychiatric institution or drug rehabilitation clinic, being prohibited from going to certain places or meeting certain people"; (rather akin to the probation order elsewhere). Unlike composition (transaction) and suspended sentence, there are no further rules governing the conditional waiver and Tak (1992:685) says that the prosecution service can impose unlimited innovative conditions. He notes that:

*This means that the prosecution service has more freedom of movement to think up and try out new behavioural conditions than the judge who is bound by statutory regulations when attaching special conditions to a suspended sentence for example. This explains why the conditional waiver is regularly used as an experimental framework for new sanction modalities. Community service is one example of this.*

Tak (1992:686) suggests that closely aligned to the waiver system "of settling a criminal case out of court" in The Netherlands is the composition (transaction) system. He calls this "a form of diversion". It is to the Dutch system of transaction that this chapter now turns its attention.

#### **7.4.2 Composition (transaction): how it works**

As previously noted, composition as a form of diversionary method can be argued to be (in certain respects) "superior" to other methods of diversion because it allows autonomy - and thereby the possible protection of self-respect - to remain in the hands of the accused. Tak (1992:686) defines this modality as "...a form of diversion whereby the accused voluntarily pays a sum of money to the public prosecution service, or fulfils one or more financial

conditions laid down by the prosecution service in order to avoid criminal prosecution and a public trial". He says that:

*The opportunity to settle criminal cases without a trial by the payment of a sum of money to the Treasury has existed for a very long time in The Netherlands, but was, until 1983, "exclusively reserved" for "infractions punishable only with a fine or with detention.*

But, "Following the recommendation of the Financial Penalties Committee, the Financial Penalties Act of 1983 opened up this opportunity for common crimes as well". Conditions attached to the system of transaction at this time were increased, providing the public prosecutor with a wider choice "[A]part from the payment of a sum of money based on the statutory fine". More conditions allowed for the possibility of other financial conditions to be applied, for example the giving up of goods following seizure or monetary payment thereof to the state and/or compensation to the victim in respect of stolen goods. Such conditions can be imposed either singly or in combination, but all relate to monetary prerequisites. These changes Tak (1992:687) suggests have not been without criticism - some writers feel that this form of out of court settlement is now little different from the conditional waiver. This important point is left to Tak to explain in this way:

*The almost unlimited power given to the prosecution service in 1983 to settle criminal cases by an amicable agreement without the intervention of a judge has been strongly criticised.... [It was said that]...the increased transaction opportunities introduced the plea-bargaining system, represented a real breach of the theory of the separation of powers, damaged the legal protection of the accused, favoured certain social groups and entrusted the prosecution service with powers which should remain reserved for judges. Furthermore it was feared that now that around 90% of all crimes had been brought within the sphere of transaction, the public accusational criminal trial, within its guaranteed rights for the accused, would change from being the rule to the exception. Particular criticism in this context was directed at the proposal to reward the accused for his co-operation in the transaction procedure by setting a much lower sum than the prosecution service would otherwise have requested in a court hearing. Such a practice...really restricts the accused's freedom of choice. As such, the critics argue, it represents a serious violation of article 6 of the European Convention on Human Rights which guarantees the right to be tried by a judge (1992:687).*

Nevertheless, Tak (1992:687) argues that "...unlike the conditional waiver, the conditions that can be attached to a transaction are explicitly and exclusively listed in the Code, and transaction is excluded for crimes carrying a prison sentence exceeding six years". Transaction affords a simple procedure which allows the prosecution service to refrain from prosecuting right up until the court hearing actually beings. Simplicity of the system is apparent from the referenced quotation hereunder:

*...the transaction proposal is sent to the accused with a giro credit slip and accompanying standard explanation. Provided the accused meets the conditions the prosecution service's right to prosecute lapses. In this sense transaction is deemed to be equivalent to an irrevocable conviction (in Tak 1992:689).*

Although Tak identifies several common features between transaction and the conditional waiver (they both have conditions which must be met - in part reiterating the earlier mentioned criticism that transaction is just a "different form" of conditional waiver), but transaction only involves financial conditions of one sort or another, which the accused must voluntarily agree to meet. And, such conditions are directed by "...detailed regulations in legislation governing the transaction procedure...[and are] confined to those listed in the Code (1992:689). (Only if a third party objects and a court accepts this objection to be "well founded", can transaction be revoked and a prosecution thereafter proceed (1992:690).) But, the most innovative tactic afforded by transaction - of most import to the argument proffered here concerning diversion - is that in The Netherlands the police service and other investigation officials are also empowered to settle certain criminal offences via transaction. Police power (and autonomy) is derived from the prosecution service and is limited, for example only the payment of a sum of money for misdemeanours which are specifically listed and which are governed by guidelines issued by the prosecution service, can be addressed in this way. Tak (1992:690) says that "Up to now only a small number of common traffic offences and a few other minor offences from the Penal Code and other special laws have been listed" in relation to police transaction. This type of system only happens in other criminal jurisdictions for traffic offences and traffic fines, but does not (as far as can be ascertained) apply anywhere else to minor offences.

#### **7.4.2.1 Police composition as a form of diversion in The Netherlands: a design for South Africa**

Comparing Police composition in the Netherlands, as a form of diversion, with the diversionary programmes at present operational in South Africa, provides for what can be argued to be both an innovative and superior form of diverting offenders from the criminal

justice forum. A form which extends Snyman's (1996:110) "first tier form of sanctioning: warning and cautioning by the police", by its very simplicity and its lack of officialdom. It achieves this simplicity by the application of pre-defined "lists" and "governed guidelines" which empower the police in The Netherlands to follow through out of court settlements which are considered too minor for the prosecution service and the judiciary in that country to process. In this respect, Snyman (1996:114) notes that in South Africa "[N]o guidelines for the evaluation of diversion programmes have been drawn up..." the necessity of which can be motivated for by looking at police transaction (diversion) figures in The Netherlands. For example, Tak (1992:690) indicates that "...in 1987 there were 1,368,218 police transactions in total, of which 1,346,010 were for traffic offences", which means that 22,208 police transactions were undertaken (in the simple manner more usually reserved for speeding fines in South Africa) in relation to minor offences.

It can be argued that in relation to the previously debated global increase of violent crimes, the overpopulation of prison establishments and probation services, and the costs involved with prosecution of relatively minor offences, that South Africa, along with other jurisdictions, would benefit from a like system to the Dutch police transaction. One might also say that the system itself may benefit the goals of diversion through expansion - to include offences which are something more than minor.

Something akin to a decriminalising directive must occur, and soon, within the legislation concerning diversion in South Africa, if the crime problem is to be successfully managed before President Mandela's warning concerning the break down of the social fabric of society in the country becomes a reality. As Snyman (1996:109) indicates, "Police are [a] front-line resource...", and as such, legislature should provide for a controlled (guidelines) extension of police powers in relation to prosecutorial sanctioning of minor offences, along the lines of the Dutch police transaction. As noted earlier, the benefits of diversion in South Africa have been somewhat neglected (due in no small measure to what Naude (1996:159) calls the "...oppressive apartheid laws practised there for many years" and, as Snyman (1996:110) says in this regard:

*[T]he experience of other countries should [now] serve as a motivation for South African reformers to be bold and pragmatic.*

How far this "boldness" may be taken in the direction of diversion policy in the country, is yet to be seen.



But what of other jurisdictions and their efforts at diversionary methods, how do they compare with the Dutch composition (transaction)?

## 7.5 OTHER DIVERSIONARY METHODS

Both the United Kingdom and the United States of America have diversionary methods which are well tried and tested and, in the main, veer more towards the Dutch composition method documented above. For example in the United Kingdom the police use warning and caution to divert juveniles from the courts. Snyman (1996:109) says that the 1985 British Home Office Circular on cautionary warning of juveniles states that:

*It is recognised both in theory and in practice that delay in the entry of a young person into the formal criminal justice system may help to prevent his entry into that system altogether. The prosecution of the juvenile is not a step to be taken without the fullest consideration of whether public interest (and the interests of the juvenile concerned) may be better served by a course of action which falls short of prosecution.*

The worrying element in this directive lies in the words "course of action which falls short of prosecution". The very fact that a course of action has been taken for and on behalf of a person (and one may also say against), is tantamount to the removal of individual autonomy and responsibility for actions. In England cautionary warnings are undertaken by the police in an official manner. A police car is sent to collect the juvenile who is to be cautioned, he is made to wait, usually alone in an anti-room, and is then faced with a Police Inspector - in full uniform (including cap) - who administers the cautionary warning, after which he is returned to his home by police car. Many juveniles react to this type of caution in a manner which can only be described as cocky defiance. The stigma provoked by this diversionary method (the visibility of being collected and returned by police car) more often than not appears to produce arrogance rather than reform. There is also the problem that, in many cases, the parents of a youth who is to be cautioned choose not to attend the cautionary warning and this means that any worthwhile shame value is lost in an act which is solitary by nature, thereby allowing the offender to recount the experience in bravado terms. In a later section of this chapter shame and accountability are taken up again in relation to a new directive in the United Kingdom which hopes to reform young offenders by trying to harness this element of worthwhile shame value (see section 6).

As mentioned earlier in the study, in the United States the method known as "probation without verdict" is employed as a form of diversion. Probation without verdict means that a probation order is handed down but both conviction and sentence are held back upon

agreement by the offender that certain conditions are met (see chapter 4, section 2.2 [p.104]). The same form of criticism can be made for this type of diversionary method as is made out for the British cautionary warning: officialdom rules, individual autonomy and responsibility take second place to the requirements of the system. Therefore, it can be argued that both the U.K.'s cautionary warning and the U.S.A's probation without verdict only veer toward *true* diversion. The offender is released back into the community with little or no recompense, but that release is conditioned by officialdom. It is argued here that the Dutch form of composition provides a superior form of diversion and consideration should be given by the South African authorities, to the inclusion of such a method within diversionary criteria.

## 7.6 OTHER PRECAUTIONARY IDEAS

As has previously been noted in this study, the world is looking for innovative ways to direct the rising crime problem. Public crime surveys have been identified as just one way to equalise the responsibility between penal administrations and lay-person ideas (the motivation for the study to hand), in the knowledge that crime has to be seen as a social problem which needs to be addressed socially. As noted above diversion is one such way - sentencing decisions are undertaken by the penal forum and the community, in one way or another (financing through state coffers or support structures), takes part responsibility for the sentence undertaking.

Another innovative idea (method) comes from the United Kingdom in the form of Howard's newest notion for tackling crime. Howard (1996:9, in the International Express, 11 September) having noted the low rates of crime in Japan suggests that:

*...the Japanese maintain their low level of crime principally by reinforcing their culture of shame and stigma. To be seen to do anything dishonourable is to be stigmatised by shame. The offender feels it; his family feels it; his associates feel it. Thus, immense pressure is put on the individual not to bring shame on his family or work associates by offending against the social or moral code.*

Howard wants young offenders to be publicly named and their families blamed for their outrages - he says:

*...let them be shamed and jeered at and made to feel foolish. It would be quick, it would be cheap, and it might be...more effective than all the other methods that have been tried - short sharp shocks, community service, cautions, surfing holidays, 'anger management' courses, probation or young offenders' institutions*

*from which, most seasoned experts agree, they emerge more skilful and more determined criminals than before.*

There are of course problems with this type of approach, for example some brazen young offenders would almost see such a shaming as a mark of honour - public notoriety may just have this effect. However, the real problem with such an idea stems from the change in societal values - along with human rights has come a brazen self-justification which has replaced the value of shame in society. Families of unruly youngsters are no longer mortified by bad behaviour and quite often take the side of the delinquent in opposition to what they appear to see as state officialdom which negates their personal rights. With this in mind, Kenny (1996:9 in the International Express September 11) says that:

*Smart-Alec lawyers convince young villains [and their families] that they are technically innocent when they are morally depraved. Councillors and agony aunts have worked hard to dissolve shame in any circumstance.*

What has to happen before Howard's plan can succeed is that there has to be a renewed shame consensus - itself noted earlier to have been devalued in recent years (or one might say shamed).

Notwithstanding such criticism, the idea as a whole appears sound on several counts. For example one might argue that the human rights movement has taken the sting out of penal policy - as indicated earlier, too many rights can be argued to be just plain wrong if society does not want to see its social (and moral) fibre totally destroyed by complete anonymity or a lack of individual accountability towards society as a whole. A shame culture of naming and blaming may, in some measure re-address society's rights, by deterring the more opportunist type of offender at least, thereby providing a worthwhile crime prevention tactic. It may also be argued that it is just wrong not to name parties involved in legal disputes - especially if decisions are taken which provide for the naming of one party and not the other as is happening more and more in the case of rape. Although the reasons for naming the accused in such cases and not the victim appear sound, problems arise when the accused is acquitted (labelling is of relevance here). Both the feminist and human rights movement have brought forth a steady increase in cases of female discrimination and sexual harassment of late and the non-naming of the presumed victim by the court, may in some cases provide the oppositional motivation to that of crime prevention! This aspect can of course be just as successfully placed within the earlier discussion on social values and notoriety, but in this case, for different reasons.

There is no doubting the worth of involving the general public in making decisions which need to be made within the judicial forum. As a new democracy, South Africa needs to show the world that the public's wishes are being listened to and no better forum exists than that of crime control. This point is noted by Naude (1996:168) within her research on a proposed victims rights model for South Africa, wherein she says:

*The wishes of the public and victims in particular...cannot be ignored in a democratic society and in the interests of a credible criminal justice system these wishes must be taken into account.*

As a final justification for public inclusion within penal matters, one or two comments from Home Office Research study No.76 on The British Crime Survey seem appropriate. The study says that crime surveys:

*...involve asking samples of the general population about crimes (whether or not reported to the police) which may have been committed against them...though they are not without their own difficulties they provide a measure of victimisation much more direct than the statistics of offences recorded by the police (in, Hough & Mayhew 1983:1).*

*Other countries have mounted national or large-scale surveys - Australia, Canada, Israel, the Netherlands and Sweden, to name a few....Police forces (for instance in the Netherlands) are also beginning to mount their own crime surveys to help in the evaluation of crime prevention measures (in, Hough & Mayhew 1983:3).*

*...crime surveys are not restricted to counting crime, but are also an invaluable source of new information about victims and the risks and consequences of victimisation (in, Hough & Mayhew 1983:3).*

and finally, and most importantly,

*In the course of their lives most people will have some experience of the police and the courts as victims of crime, witnesses, offenders or suspects. A great many people also have contact with the police on matters completely unrelated to crime. Their reactions to all these experiences, and the expectations they hold of the police and the courts, are central to the smooth running of the*

*criminal justice system - because any democratic system of law needs the consent of those whom it polices (in, Hough & Mayhew 1983:28).*

The British research primarily looked at seriousness, but Pease (1988) made a tentative attempt to tie seriousness scores to sentence preference. Taking his method as a "starting point" (see Pease 1988 p.p 34-44), and remembering that the BCS, unlike the research herein, deals only with victims and utilises a different methodological tool, reproduced hereunder is a tentative compilation of seriousness/sentence preferences taken from this research showing the South African public's attitude towards the sentencing of certain types of crime in society.

## **7.7 A PROPOSED SENTENCING GUIDE (severity index) FOR SOUTH AFRICA**

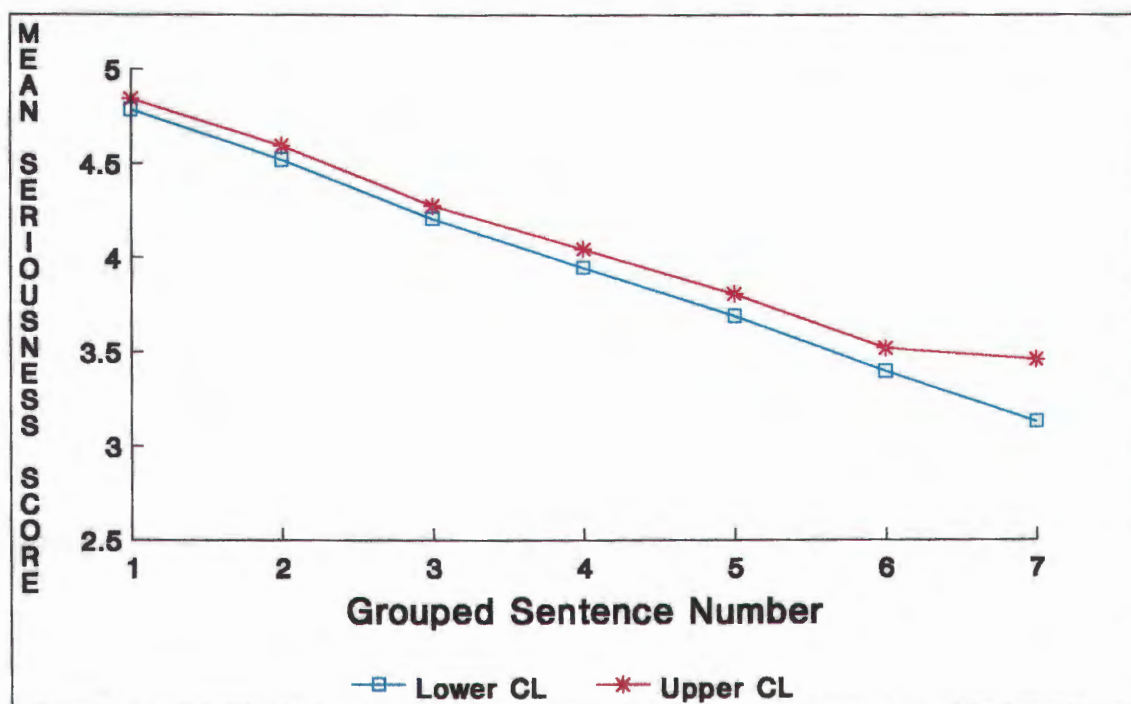
### **7.7.1 Discussion**

By using the research findings it is possible to provide a sentencing guide (severity index) as an indication of respondent wishes concerning seriousness of specific crimes and sentence choice. In order to offer a more concise and meaningful summation of the survey population's seriousness/sentence scores, the section which follows established a new rationalised reduction of the 23 original sentence options and the 22 crimes. The two sub-groupings of crimes (i.e the general/specific nature crimes), established within Chapter 5 (seriousness scores) carried through to Chapter 6 (sentencing scores) and further utilised together with the three sub-groupings of crimes (bodily/secondary harm and property crimes), now fall away. The original 23 sentence options are here reduced to 7 on the basis of seriousness scores and, likewise, the 22 crimes are reduced to 6. Reduction of both the 7 sentence groups and the 6 crime groups were purposefully undertaken in relation to the mean seriousness scores provided by the survey population.

### **7.7.2 The 7 rationalised sentence options**

Consideration of the confidence limits for mean seriousness scores shown in Chapter 6, figures 6.7 [p.178] & 6.9 [p.183] point to obvious groupings of those sentences with similar seriousness scores. Figure 7.1 shows that these groupings can be clearly differentiated with no overlap between confidence limits, thus, it is argued, providing justification for the chosen groupings hereunder:

**Figure 7.1: 95% confidence intervals (CL) - mean seriousness scores for grouped sentences**



#### KEY

1. Prison: 20+ years - (original sentence numbers: 1 & 11)
2. Prison: 6-19 years - (original sentence numbers: 7 & 10)
3. Prison: 1-5 years - (original sentence numbers: 4 & 6)
4. Quasi Prison: (see Sec.7.2) - (original sentence numbers: 3,22,14 & 12)
5. Large fine/correctional sup./  
short prison - (original sentence numbers: 2,21 & 19)
6. Small fine/whipping/  
suspended sent - (original sentence numbers: 18,20 & 23)
7. Other - (original sentence numbers: 13,15,16 & 17)

**Group 1 sentence** - the implementation of the death penalty or imprisonment of 20+ years. This sentence option now embraces what can be thought of as a "life sentence".

**Group 2 sentence** - imprisonment of between 6-19 years.

**Group 3 sentence** - imprisonment of between 1-5 years.

**Group 4 sentence** - termed "quasi" imprisonment, for example half - 1 year prison term, or a period of imprisonment followed by correctional supervision/institutionalisation.

**Group 5 sentence** - a high fine (R600+) or correctional supervision or a short prison term.

**Group 6 sentence** - a low fine, whipping or suspended sentence.

**Group 7 sentence** - "other", embraces those sentences which were little chosen by respondents (and which, it will be noted, do not appear as popular sentences in the Guide to follow due to their low count) which afforded too small a percentage to feature within the sentence figures in Chapter 5.

### **7.7.3 The 6 rationalised crimes**

A similar approach to that utilised above in terms of seriousness groupings was followed in order to reduce the initial 22 crime categories to 6. As Table 5.9 and figure 5.2 highlight, (see chapter 5, sections 6.4 & 6.4.1 respectively [p.151,152]), the crimes fall into fairly obvious groups based on mean seriousness scores and on the nature of the crime, as discussed previously in Chapters 5 and 6.

**Group 1 crimes: (serious attack/death)** relate to premeditated murder, manslaughter/drive/death and terrorism. These crimes often involve the death of an innocent victim.

**Group 2 crimes: (sexual)** relate to rape and sexual molestation.

**Group 3 crimes: (personal attack)** relate to mugging, being attacked by strangers, insulted or assaulted.

**Group 4 crimes: (public/economic)** relate to stealing goods, fiddling tax, fraud, corruption, political intimidation and the selling of drugs.

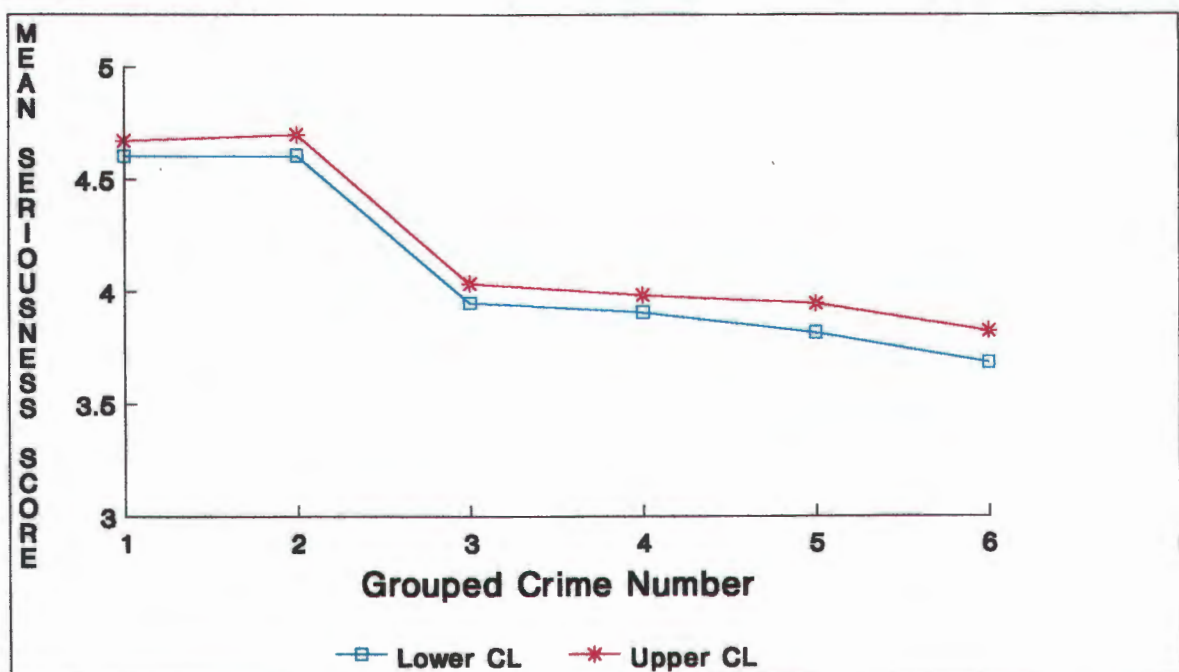
**Group 5 crimes: (personal harm/choice)** relate to smoking dagga, prostitution and drink/drive.



**Group 6 crimes: (personal asset)** relate to housebreaking and the stealing of a vehicle.

Figure 7.2 shows firstly that options 1 & 2 (serious attack/death/sexual crimes) could be grouped together on the basis of seriousness scores. However, they have been kept distinct since they are seen to attract different sentence options. Similarly, although groups 3-6 (personal attack/economic/self harm/property crimes) do not differ significantly in their mean seriousness scores, the groups have been purposefully devised to summarise sentence options.

**Figure 7.2 - 95% confidence intervals (CL) - mean seriousness scores for grouped crimes**



#### KEY

1. Serious attack/death - (original sentence numbers: 1, 3, 8 & 20)
2. Sexual crimes - (original sentence numbers: 12, 13, 15 & 22)
3. Personal attack - (original sentence numbers: 2 & 14)
4. Public (economic) crimes - (original sentence numbers: 11, 18, 19, 7, 16, 17 & 10)
5. Personal harm crimes - (original sentence numbers: 6, 9 & 21)
6. Personal asset crimes - (original sentence numbers: 4 & 5)

#### 7.7.4 Overview: grouped sentences & grouped crimes

To reiterate, looking at figure 7.1 it is noted that confidence intervals for mean seriousness scores for the grouped sentences clearly show group separations which re-confirm the confidence intervals noted in Chapters 5 (seriousness scores) and 6 (sentence scores). It can be seen that as respondent perceived seriousness decreases, so does the severity of

sentence. And, although there is something of an overlap of confidence intervals for crime groups (figure 7.2), it can, nevertheless, be suggested that mean seriousness scores do decrease with crime severity. For example, the crime of murder - a group 1 crime - has a mean seriousness score of 4.91, whilst the crime of smoking dagga - a group 5 crime - has a mean serious score of 3.72.

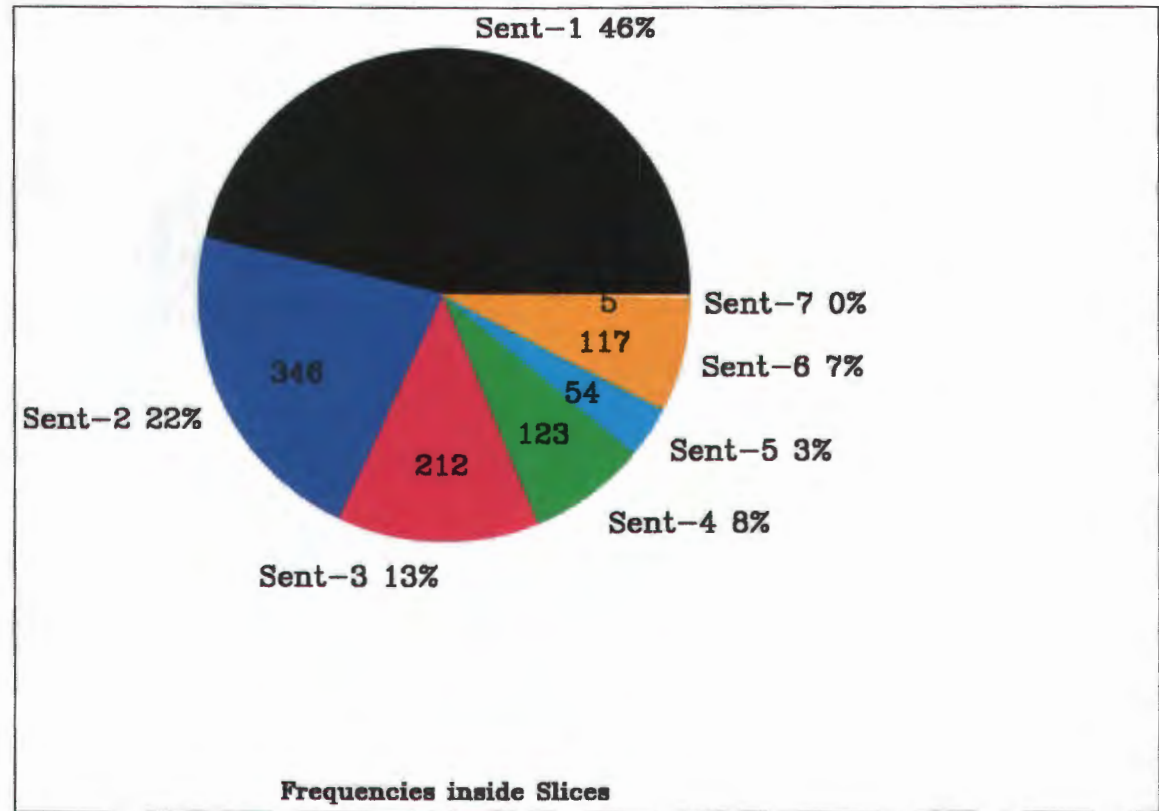
Each new crime group was investigated and the most common sentences for these types of crimes were identified. The following pie charts illustrate this.

**7.7.5 Pie charts for the recommended sentences for grouped crimes**

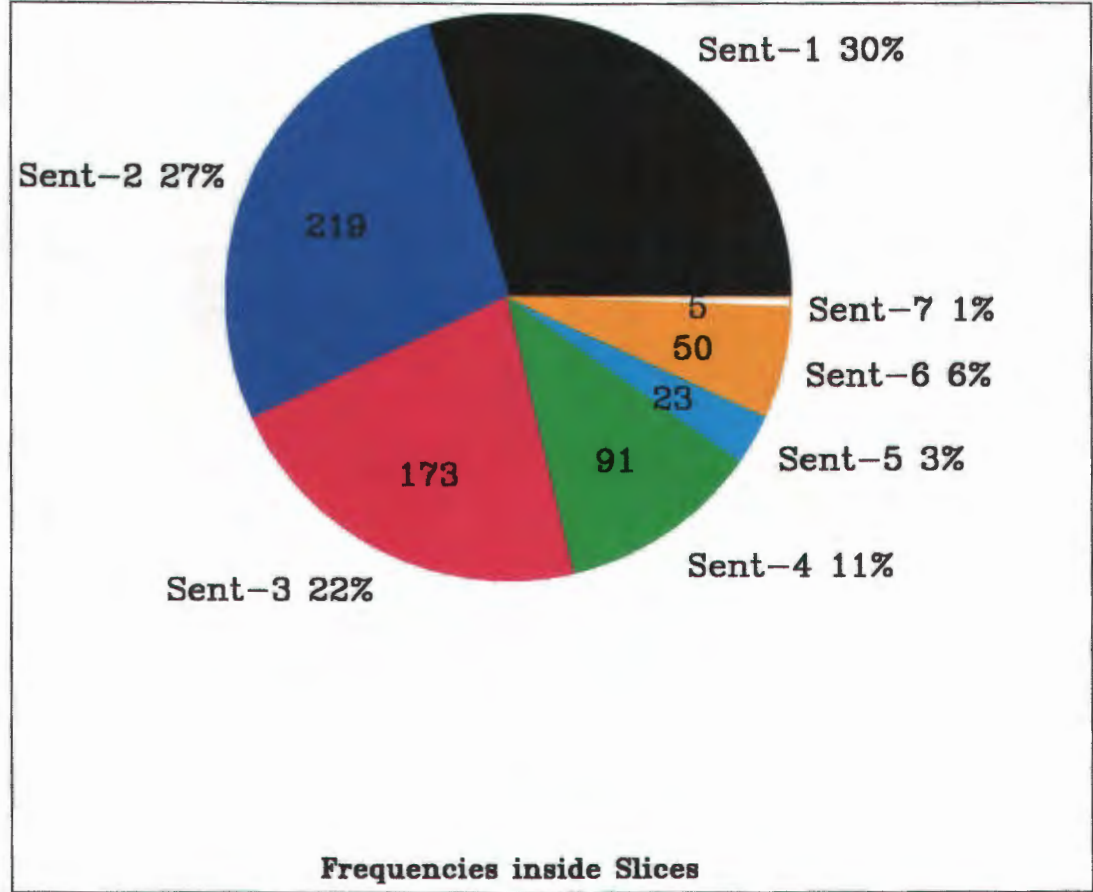
**KEY**

- |   |   |
|---|---|
| 1. Prison: 20+ years                                | 2. Prison: 6-19 years                     |
| 3. Prison: 1-5 years                                | 4. Quasi Prison (see section 7.2)         |
| 5. Large fine/short prison/correctional supervision | 6. Small fine/whipping/suspended sentence |
| 7. Other  |   |

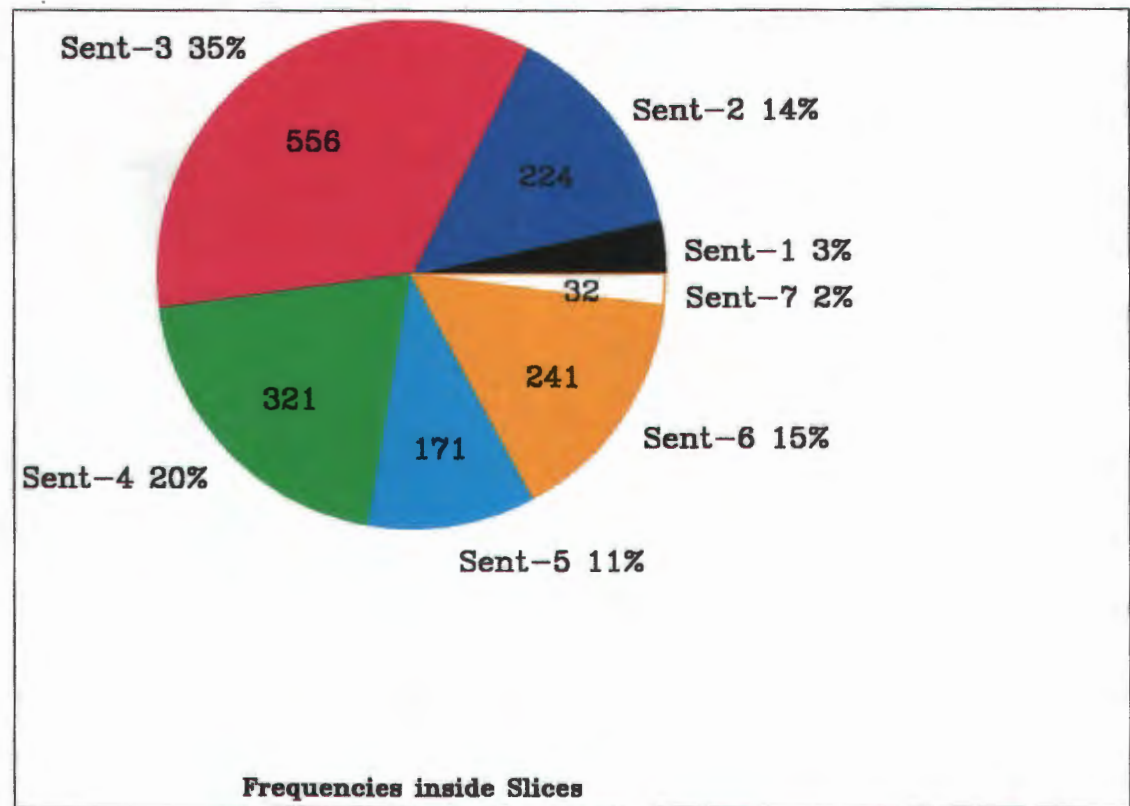
**Serious attack/death**



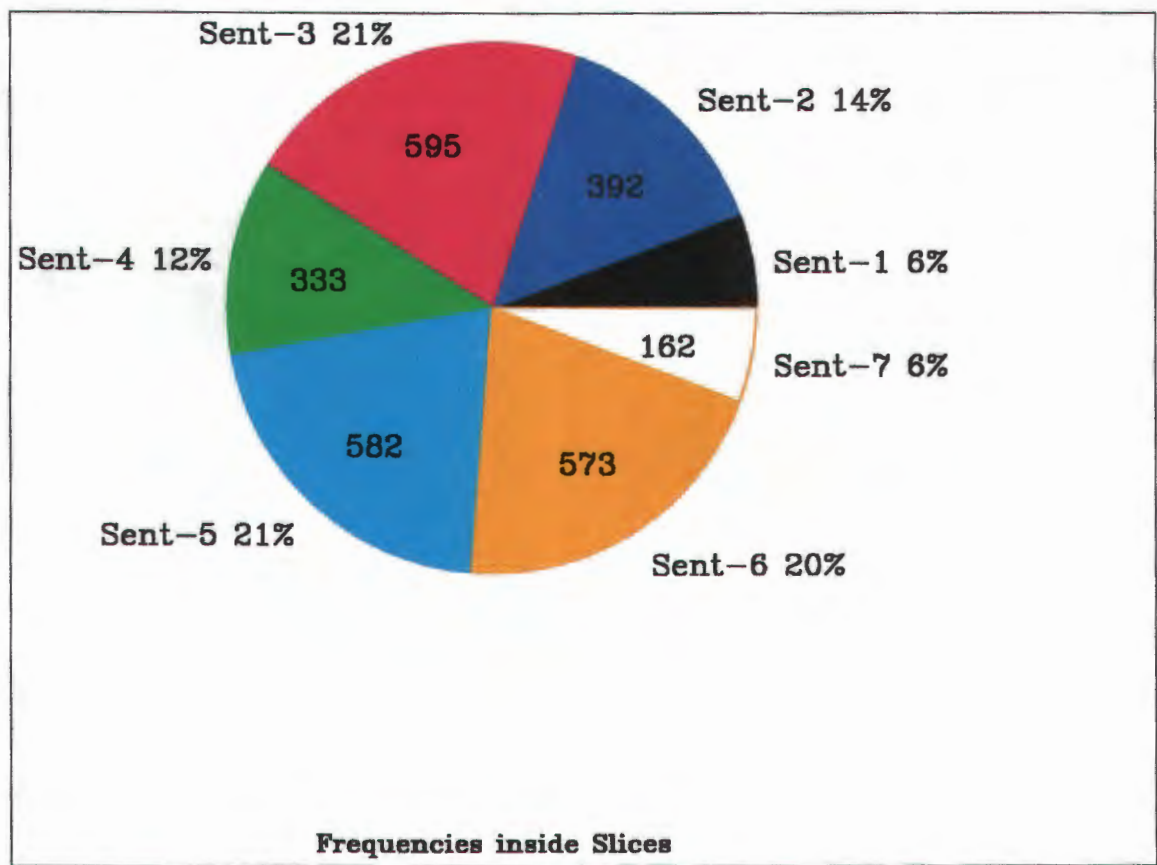
**Sexual crimes**



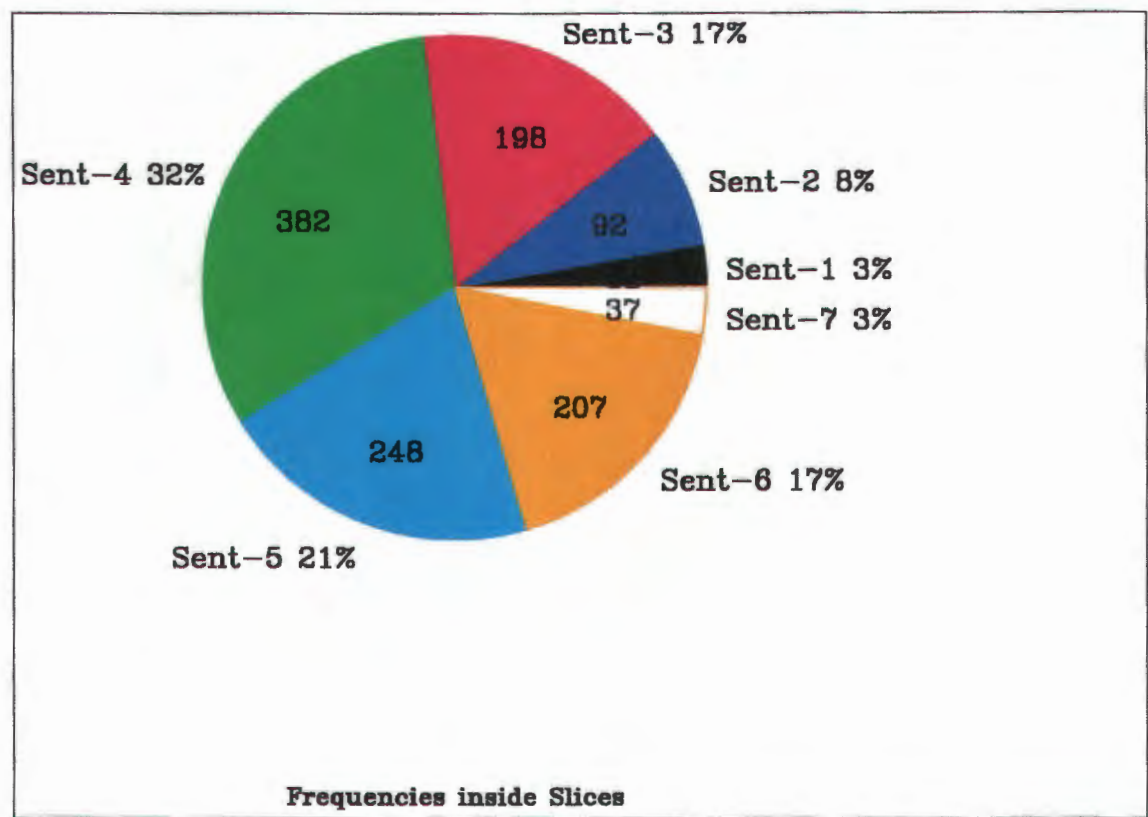
**Personal attack**



**Public (economic) crimes**

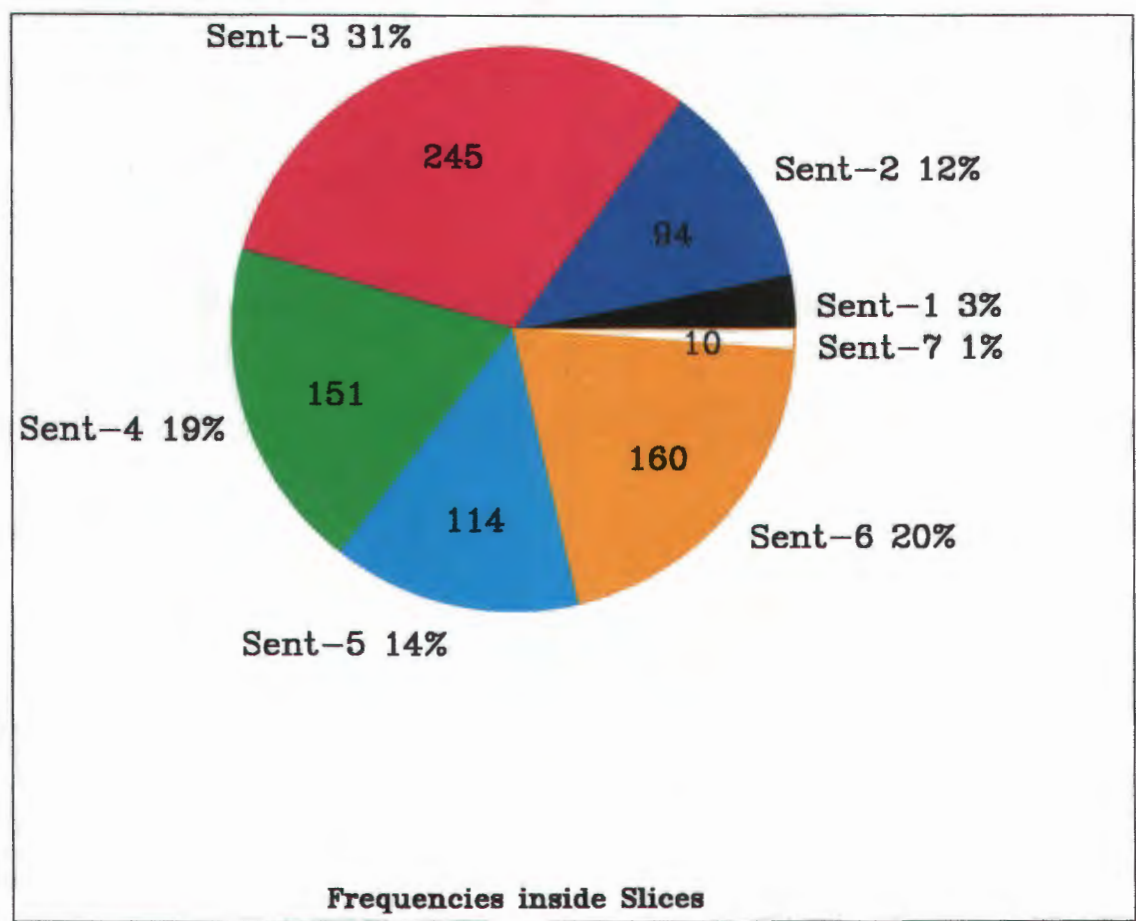


**Personal harm crimes**





**Personal asset crimes**

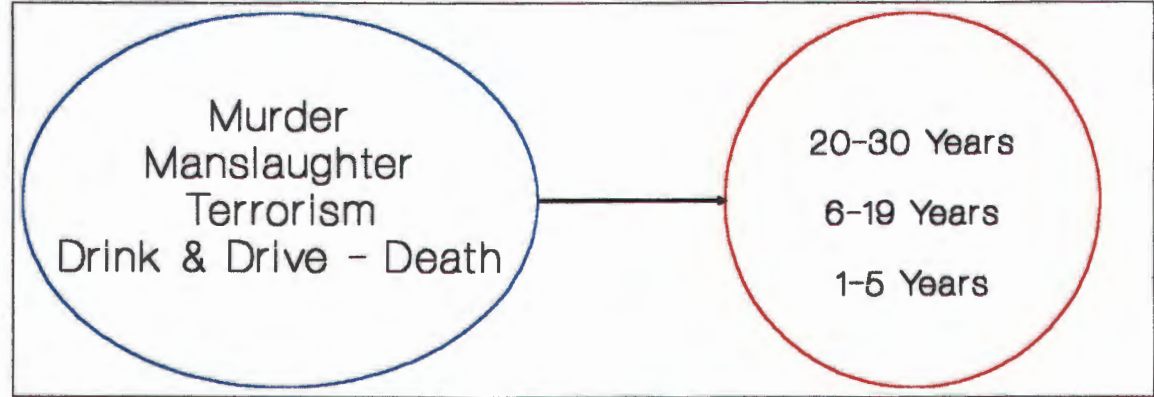


Based upon these observations, the following South African sentencing guide was constructed:

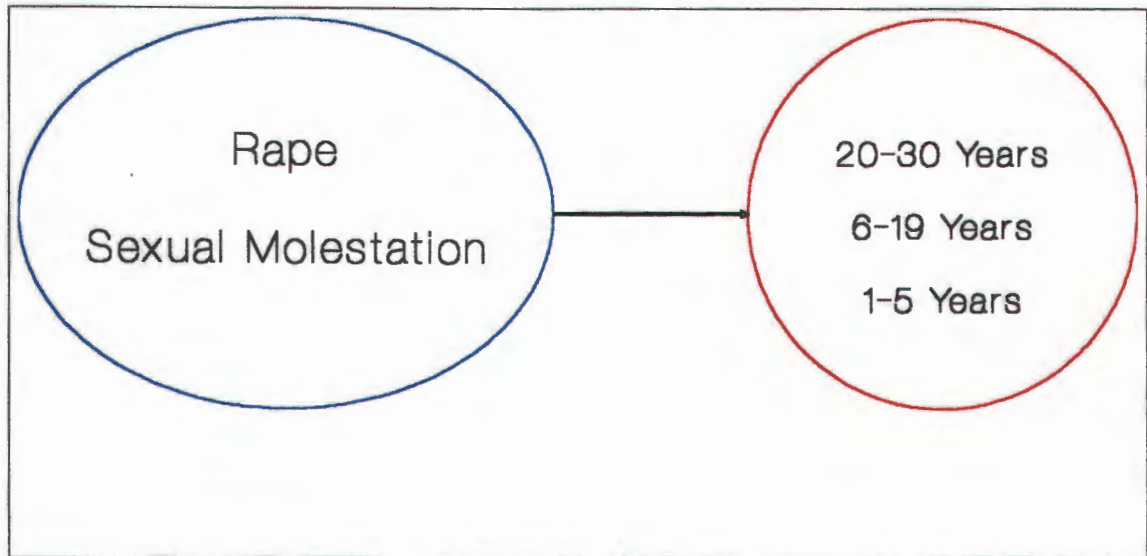
**7.7.5.1 The S.A. sentencing guide**

The guide hereunder is formulated from respondent recommendations utilising the percentages recorded in the pie charts above.

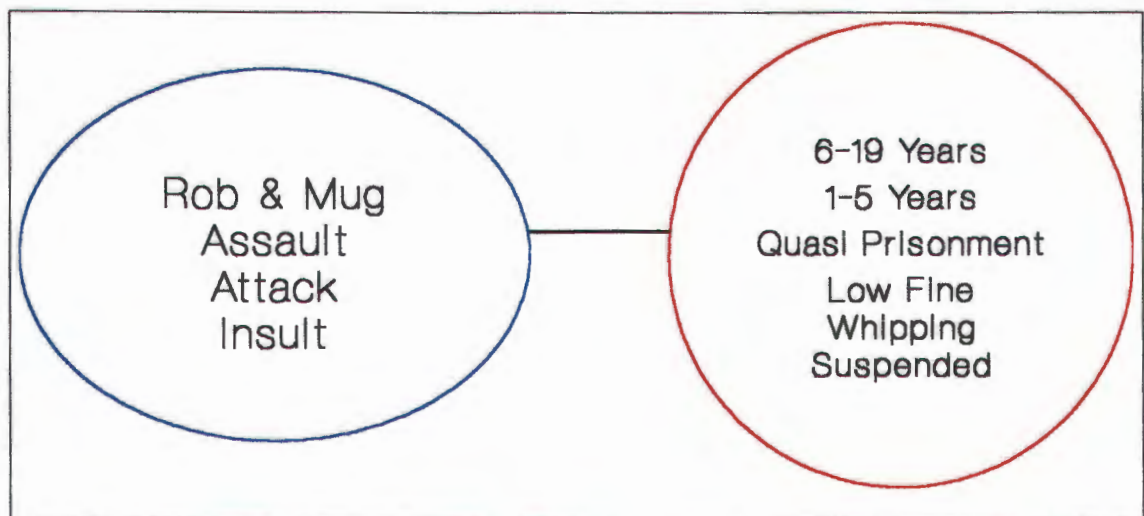
**Serious attack**



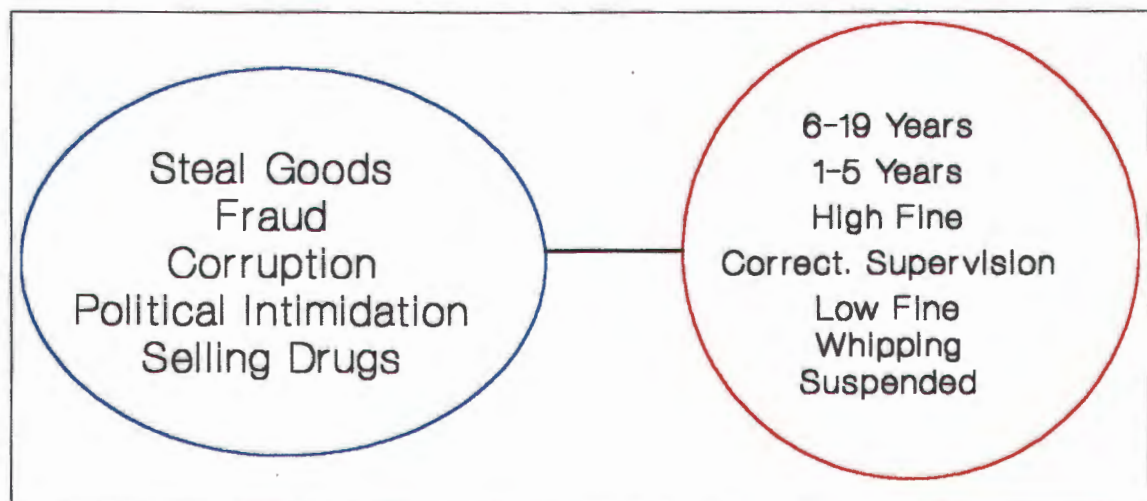
### Sexual crimes



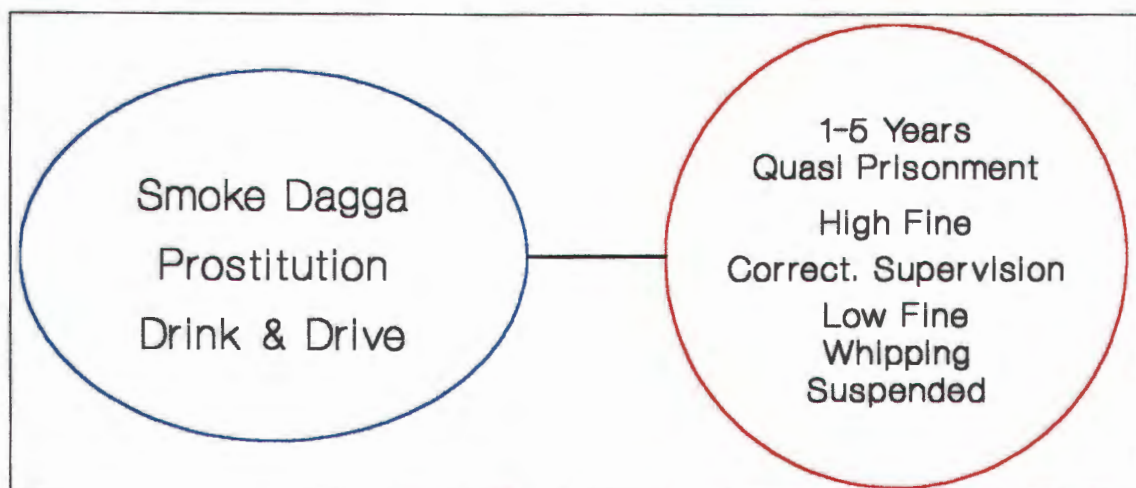
### Personal attack



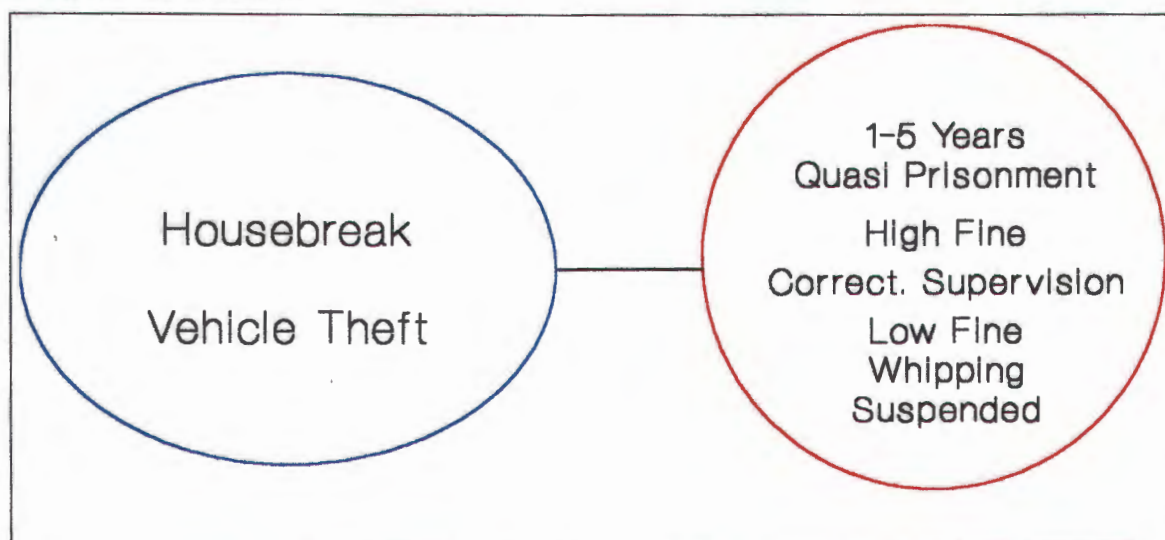
### Public (economic) crimes



### Personal harm crimes



### Personal asset crimes



Here one notes, for example, that group 1 crimes can - according to the Pretorian public's sentence choice - be sentenced predominantly using the first three sentence options as laid out in 7.2 above, i.e., life imprisonment or any prison sentence of 1 year onwards (to 30 years), depending, as indicated earlier, upon "severity, mitigating factors and the sentencer's decision concerning aptness for the offence in question". In other words, as indicated in Chapter 6, the death sentence can be interchanged with the sentence of 20-30 years imprisonment for the *worst* (most serious) crimes. These sentences accounted for 81 percent of all sentences for these crimes. The severity order of sentence options provided by the sentencing guide, give sentencing practitioners some indication of how the Pretorian public would like to see sentence passed in relation to specific crimes in South African society. As noted above in section 7.4, as perceived seriousness decreases so does severity of sentence and confidence intervals are supported at 95 percent.



Looking at the remaining crime groups, it is noted that group 2 crimes (sexual crimes), again attract life imprisonment or any prison sentence of 1- 30 years, which sentences accounted for 79 percent of all sentences for these crimes. Group 3, the personal attack type crimes, can be sentenced either with imprisonment or a range of other sanctions from a low fine, whipping or even the suspended sentence, depending upon the judge's assessment of the seriousness of the crime. These sentences accounted for 84 percent of all sentences for these crimes. Group 4, the public (economic) crimes, should be sentenced either with a prison term, a high or low fine or correctional supervision. These sentences accounted for 76 percent of all sentences. Group 5, the personal choice crimes, find sentences ranging from imprisonment to a high fine and correctional supervision, accounting for 87 percent of all sentences, whilst group 6, the personal asset crimes (property), offer sentence choice between imprisonment and correctional supervision. These sentences accounted for 84 percent of all sentences.

## **7.8 CONCLUSION**

This study has researched the problems of crime in society by assessing the historical backdrop to sentencing theory and penal practice, both globally, and in the case of South Africa. The study provided an extensive survey report based upon the findings of a questionnaire on seriousness and sentencing administered to the people of Pretoria. Contemporary sentencing policies were debated in the light of the study motivation for the inclusion of public opinion into the sentencing forum within South Africa. It is suggested that the initial research theme - to include respondent wishes within a sentencing policy - is supported within the study, and can be utilised to provide a "practical benefit" to juridical process and policy making in South Africa.

In this the final chapter, various ideas pertaining to crime prevention were debated and the case for public involvement in penal decisions was reaffirmed. The chapter culminated by attempting to provide a South African sentencing guide based upon respondent seriousness/sentencing scores for specific types of crime.

## **ENDNOTE 1**

President Mandela's reference to the breakdown of the social fabric of society in South Africa was made in relation to the crime problem in terms of criminals. However, in Chad, a different form of breakdown is occurring - a breakdown which emanates not from the actions of the offender, but from the actions of the criminal courts in that country. According

to N'Djamena in The Herald of January 13 1997 "Chad's foreign minister Saleh Kebzabo defended Chad's new policy of summarily executing alleged criminals". Kebzabo justifies the new policy by saying that the courts in Chad are corrupt and that they systematically free criminals and wrongdoers. Human rights groups reporting on the situation in Chad tell of scores of Chadians put to death by security forces under the new policy which was confirmed in a decree issued by President Idriss Deby (effective since November 1996) giving orders to police commands in the country to "...forget the courts when dealing with criminals caught in the act...". Kebzabo maintains that the new policy is effective and working well in the fight against crime. He says, "We no longer see the levels of violence before it was introduced".

## **ENDNOTE 2**

The Resolution (to be renamed HMS Weare), bought by The U.K. Prison Service from the New York Department of Correction at a cost of 4 million pounds, is to be anchored off the coast of Portland. It will provide holding space for 500 inmates. The floatation is a 100ft high, five storey, slab-sided accommodation vessel which has two swimming pools and a gymnasium. Prison hulks were last used in Britain during the last century (Weekly Telegraph, issue No.295, March 1997).

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42 Orpen Road  
LYDIANA  
Pretoria 0184

August 1993

Dear Prof./Dr./Mr./Mrs/Miss

**Re: Completion of questionnaire concerning sentencing in South Africa**

In order to obtain more knowledge about the public's attitude towards the sentencing process in South Africa, the writer is conducting a scientific investigation. You have been selected to take part in this research by completing the attached questionnaire. The research is undertaken by the writer for a doctoral study in the Department of Criminology at the University of South Africa. This questionnaire forms a necessary part of the research procedure.

The aim of the survey is to determine the public's attitude towards particular issues concerning the sentencing of offenders. Firstly, to ascertain the public's ideas about the seriousness of specific crimes, and secondly to find out the public's wishes about particular sentences for particular crimes. The questionnaire also searches the public's ideas concerning the decriminalisation of some criminal offences. Completion of this questionnaire should take no longer than 20 minutes of your time. If you would like to check the authenticity of this research project, you can either telephone the writer (telephone number at foot of letter) or Professor CMB Haudé at the Department of Criminology, Unisa, (promotor of the thesis).

Respondents were chosen at random using scientifically accepted research selection. In line with the research method, THE PERSON IN YOUR HOUSEHOLD (ABOVE THE AGE OF 18 YEARS) WHO WILL CELEBRATE HIS/HER BIRTHDAY NEXT IS REQUESTED TO COMPLETE THE QUESTIONNAIRE. All that is required is that you answer the questions honestly - THERE ARE NO CORRECT OR INCORRECT ANSWERS. There is no need for you to provide your name or to sign the questionnaire. All knowledge obtained from this research is to be treated as STRICTLY CONFIDENTIAL and will be used only for the purposes of private research. However, it is hoped that the juridical body will take the findings of the survey into account as a measure of the public's wishes when formulating future policy on sentencing in South Africa. Therefore, your beliefs/wishes about the sentencing of offenders may make an important contribution to sentencing reform in this country.

Thank you for your co-operation.

Yours faithfully,

FOR OFFICE USE ONLY				1-3
QUESTIONNAIRE NUMBER				
CARD NUMBER	0	1		4-5

Doreen J. Pitfield (Mrs.)  
Tel: 868987

Interviewer introduction.

I am an interviewer from the Department of Criminology, UNISA. I should like to begin by asking you one or two questions concerning your personal status. I will mark a cross (X) in the option of your choice. I would ask you to please answer all questions HONESTLY and according to your OWN opinion. If you do not understand any of the instructions, definitions, choices, please ask for my help.

SECTION A1 : PERSONAL DETAILS

A1 Your population group?

1	2	3	4
White	Black	Coloured	Asian

6

A2 Your sex?

1	2
Male	Female

7

A3 Your age? (In years) \_\_\_\_\_

--	--

8-9

A4 Your formal educational or equivalent qualification?  
(Indicate only the HIGHEST ONE)

1	2	3	4	5	6	7	8
None	Lower than Std 6	Std 6 to Std 8	Std 9 to Std 10	Post school certificate	Diploma	Degree	Post graduate

10

A5 What language do you generally speak at home?

Afrikaans	1	Afrikaans & English	3
English	2	Other (Specify) .....	4

11

A6 Your occupation? (Mark only ONE choice)

<u>PROFESSIONAL</u> - Advocate, judge, accountant, medical practitioner, natural and human scientist, lecturer, teacher, social worker, pharmacist, architect, etc.	01
<u>HELPING PROFESSION</u> - Defence force-, police-, correctional service-, fire brigade-, nursing personnel, etc.	02
<u>ADMINISTRATIVE, EXECUTIVE, OR MANAGING OFFICIAL</u> - Director, self-employed manager, senior government official, bank manager etc.	03
<u>CLERICAL WORKER</u> - Clerk, cashier, junior government official etc.	04
<u>SALESMAN/ MARKETING</u> - Clerk, cashier, junior government official etc.	05
<u>FARMER</u> - Farm manager, forester, hunter, etc.	06
<u>MINER</u> - Mine captain, shift-boss, shaft-digger, etc.	07
<u>TRANSPORT WORKER OR COMMUNICATION WORKER</u> - Taxi driver, bus driver, lorry-driver, conductor, engine-driver, telephone operator, radio operator, etc.	08
<u>SKILLED ARTISAN</u> - Persons qualified in their trade	09
<u>SEMI-SKILLED</u> - Apprentice, trainee, etc.	10
<u>UNSKILLED ARTISAN</u> - Labourer, charwoman etc.	11
HOUSEWIFE	12
PIECE- WORKER	13
UNEMPLOYED	14
PENSIONER	15
<u>OTHER: PROFESSIONAL, SEMI-PROFESSIONAL AND TECHNICIAN</u> Specify : .....	16
<u>OTHER: GENERAL</u> - Guide, hairdresser, waiter, caretaker, funeral undertaker, etc. Specify : .....	17

12-13

A7 What is your present marital status?

Married	Single	Divorced	Widow/er	Living together
1	2	3	4	5

14

A8 What is your religious denomination?

Calvinist (eg. Dutch Reformed)	01
Roman Catholic	02
Lutheran	03
Anglican	04
Methodist	05
Apostolic Groups (AGS)	06
Hindu	07
Islamic	08
Jewish or Hebrew	09
Black Independent (ZCC)	10
No religion	11
Other (Specify):	12

15-16

## SECTION A2: VICTIM OF CRIME/FEAR OF CRIME

A2.1 Were you or someone in your household a victim of any crime which was serious enough to be reported to the police during the last 5 years?

Yes	No
1	2

17

A2.2 In your opinion, what is the likelihood that you might become a victim of the undermentioned crimes?

	Very high	High	Uncertain	Minimal	None	
Rape	1	2	3	4	5	18
Assault	1	2	3	4	5	19
Robbery	1	2	3	4	5	20
Housebreaking	1	2	3	4	5	21
Theft	1	2	3	4	5	22



A2.3 Were you ever a victim of any of the abovementioned crimes at home?

Yes	No	
1	2	23

A2.4 Were you ever a victim of any of the abovementioned crimes in your residential area?

Yes	No	
1	2	24

A2.5 Are you anxious that you might in general become a victim of crime?

Yes	No	
1	2	25

A2.6 Do you believe the victim of a crime should have an input into the sentencing of the offender (i.e. should help the court to decide the punishment to be handed down)?

Yes	No	
1	2	26

A2.7 Please rate on a scale of zero to five the chances of the following events happening to you in the future. A zero means you think it will never happen and a five means that you think the event will almost certainly happen to you.

(a) That you may be mugged on the street.

0	1	2	3	4	5	
						27

(b) That you may be attacked in your own home.

0	1	2	3	4	5	
						28

(c) That, if you own a vehicle, it could be stolen.

0	1	2	3	4	5	
						29

**SECTION B**  
**SERIOUSNESS ATTITUDE TOWARDS SPECIFIC CRIMES**

The following categories of crime are not actual cases but are typical of the types of crimes experienced within society. Please record your opinion of the seriousness of each crime by asking the interviewer to mark an (X) in the appropriate box. Box 1 represents the MOST SERIOUS option and Box 5 represents the LEAST SERIOUS. Please take note of the definitions offered against some of the categories of crimes. Questions 1 - 11 require you to think of the crime denoted in general (rather than specific) terms.

B1 Someone being mugged and robbed

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	30
-----------------	------------	------------	-----------------	-----------------------	----

B2 A woman being sexually molested and pestered

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	31
-----------------	------------	------------	-----------------	-----------------------	----

B3 Someone being attacked by strangers

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	32
-----------------	------------	------------	-----------------	-----------------------	----

B4 A home being broken into and something being stolen

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	33
-----------------	------------	------------	-----------------	-----------------------	----

B5 A car being stolen for a joyride

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	34
-----------------	------------	------------	-----------------	-----------------------	----

B6 Someone smoking cannabis or marijuana (dagga)

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	35
-----------------	------------	------------	-----------------	-----------------------	----

B7 Someone fiddling their income tax

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	36
-----------------	------------	------------	-----------------	-----------------------	----

B8 Someone being insulted or battered by strangers, but not in a serious way

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	37
-----------------	------------	------------	-----------------	-----------------------	----

B9 A prostitute soliciting for trade

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

38

B10 Someone stealing R10 worth of goods from a shop

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

39

B11 Someone stealing R100 worth of goods from a shop

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

40

B12 Someone murders another - defined as "the unlawful deliberate taking of another's life through violent encounter".

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

41

B13 Someone guilty of the crime of manslaughter - defined as "the killing of a person illegally but not intentionally". For example: The offender was drinking with friends in a local bar when a group from another community came in. A fight started between the two groups, and in the free-for-all that followed, the offender knocked the victim into the bar where his head struck the corner of the bar. The victim died.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

42

B14 The rape of someone - defined as "deliberate unlawful carnal intercourse with another against their will" for example: A young girl is walking home alone from school when she is confronted by a young man who forces her off the footpath and into the veld, where he rapes her. She is physically and emotionally injured by the rape and has to be hospitalised.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

43

B15 The act of terrorism - defined as "a strategy of violence designed to instill terror in order to achieve a power outcome" for example: A man enters a Wimpy outlet and leaves a parcel which contains a bomb. The bomb explodes and kills 30 innocent people. The man phones a local newspaper and claims responsibility for the act in the name of a particular political party.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

44

B16 Someone acts fraudulently - defined as "a representation of fact which is known by the representee to be falsely made with intent to deceive and resulting in actual or potential prejudice to another", for example: A stranger offers you a jacket which he says is genuine leather whereas it is actually imitation.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

45

B17 An act of corruption - defined as "any person who gives or offers or agrees to give to an official any benefit which is not legally due in respect of any act in his official capacity", for example: A hospital is to be built in your location and tenders for the building works are invited by the authorities. As an employee of a building company you are asked to put your company's tender together and submit it to the authority. You find out that although your company's tender is the cheapest, the job is given to another firm in return for an overseas trip for someone high-up within the governing authority.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

46

B18 An act of political intimidation - defined as "an act of aggression aimed at a civilian target with a view to promoting a particular objective", for example: A political meeting has been called in the canteen of your company. Your colleagues try to convince you to attend but you decided against it. That night the same colleagues congregate outside your home, shout abuse at you and your family and break windows, fences and plants as a way of showing their disapproval at your non-attendance of the meeting.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious
-----------------	------------	------------	-----------------	-----------------------

47

B19 The selling of illegal drugs - where illegal drugs are defined as "any substance which is dependence forming", for example: A street vendor stands outside your child's school on the pretext of selling confectionary. In the process of this "innocent" selling the vender sells/offers your child dagga.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	48
-----------------	------------	------------	-----------------	-----------------------	----

B20 An offence of assault and robbery, for example: Just after dark an offender approaches a person from the rear, knocks them to the ground, steals from their person and runs.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	49
-----------------	------------	------------	-----------------	-----------------------	----

B21 Driving a motor vehicle whilst over the legal alcohol level.

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	50
-----------------	------------	------------	-----------------	-----------------------	----

B22 As question B21, but causing the death of an innocent victim (culpable homicide).

1. Very serious	2. Serious	3. Average	4. Less Serious	5. Not at all Serious	51
-----------------	------------	------------	-----------------	-----------------------	----

FOR OFFICE USE ONLY				1-3
QUESTIONNAIRE NUMBER				
CARD NUMBER	0	2		4-5

### SECTION C

#### ATTITUDE TOWARDS THE SENTENCING OF A SPECIFIC CRIME

The following sentencing options are available to the South African courts as a means of punishment for specific crimes. You are asked to "sentence" the same crimes you gave "seriousness" scores to in the previous section. Please answer all questions honestly by indicating to the interviewer in which box you wish to mark a cross (X).

Here is a list of the options available to the court for sentencing offenders. Please listen to each option carefully, taking particular note of the explanations offered for some. Sentence options have been reproduced from Article 276 of the Criminal Procedure Act, Act 51 of 1977.

- (1) the sentence of death
- (2) imprisonment, including imprisonment for life

In South Africa, the sentence of "life" usually equates to 20 years, unless the court direct otherwise. If you "sentence" an offender to imprisonment, please indicate the term of imprisonment you would wish to see imposed.

- (3) periodical imprisonment:

Periodical imprisonment involves the offender being sentenced to so many hours in a prison establishment. These hours are "worked" over weekends. During the week the offender continues his/her normal life-style (lives at home, goes to work etcetera). He/she enters the prison establishment on Friday p.m. and leaves again on Monday a.m. until the sentence hours are worked off.

- (4) declaration as an habitual criminal

This sentence is an indeterminate sentence applied in the case of the most hardened criminal. The minimum duration of imprisonment is 7 years.

- (5) committal to any institution established by law

The court is able to recommend that the offender be removed to an institution either for treatment or for rehabilitation, for example a mental hospital or a rehabilitation centre.

- (6) a fine

The fine is a popular form of sentence throughout the world and is usually worked out in terms of the offender's means. If you choose this option please indicate the amount you would like to see paid by the offender.

(7) corporal punishment (whipping - cuts)

This form of punishment is more usually applied to juveniles than to adults (a juvenile can be subjected to a maximum of 7 cuts administered by a light cane). However, 7 cuts can also be recommended by the court as a sentence for adults. For the purpose of this research you are asked to consider this form of punishment in terms of adults only.

(8) correctional supervision (N.B. no imprisonment involved)

This sentence can involve numerous "checks" upon an offender. He/she may be required to report at regular intervals to a correctional supervision officer. He/she may be required to be at home after certain hours, to refrain from frequenting certain places or associating with certain people. Or, the offender may be required to attend specific types of "treatment programmes", for example a psychological programme.

(9) imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

If this sentence is imposed by the courts it means that an offender is required to serve a period of imprisonment, after which the offender is released into the community subject to a period of "checks" as at (8) above. (NB Both term of imprisonment and "checks" period are decided by the court at the time of sentence).

(10) the suspended sentence

This sentence is more usually applied to a juvenile, but you are asked to consider it in terms of the adult offender. Basically, the court decides upon a term of imprisonment to be served in relation to the offence committed, but this term is suspended (held over) for a period of time during which the offender is required to remain offence free and submit to certain conditions decided by the court (as at 8 above). If the offender offends again whilst under suspended sentence, the court has the authority to re-instate the prison term originally imposed by the court.



C1 Someone being mugged and robbed (81)

1. The sentence of death

01

2. Imprisonment

0-5 months	02
6-11 months	03
12-23 months	04
2-3 years	05
4-5 years	06
6-7 years	07
8-9 years	08
10-14 years	09
15-19 years	10
20-30 years	11

3. Periodical imprisonment

12

4. Declaration as an habitual criminal

13

5. Committal to any institution established by law

14

6. A fine

R1-24	15
R25-49	16
R50-99	17
R100-500	18
Above R600	19

7. A whipping (cuts)

20

8. Correctional supervision

21

9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

22

10. Suspended sentence

23

6-7

C2 A woman being sexually molested and pestered (82)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	8-9

C3 Someone being attacked by strangers (B3)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	10-11

## C4 A home being broken into and something being stolen (B4)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	12-13

C5 A car being stolen for a joyride (B5)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	14-15

C6 Someone smoking cannabis or marijuana (B6)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	16-17

C7 Someone fiddling their income tax (B7)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	18-19



CB Someone being insulted or battered by strangers, but not in a serious way (BB)

1. The sentence of death	01		
2. Imprisonment	0 5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Connnittal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discrelton by the Commissioner.		22	
10. Suspended sentence		23	20-21

C9 A prostitute soliciting for trade (89)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	22-23

C10 Someone stealing R10 worth of goods from a shop (B10)

1. The sentence of death

01

2. Imprisonment

0-5 months

02

6-11 months

03

12-23 months

04

2-3 years

05

4-5 years

06

6-7 years

07

8-9 years

08

10-14 years

09

15-19 years

10

20-30 years

11

3. Periodical imprisonment

12

4. Declaration as an habitual criminal

13

5. Committal to any institution established by law

14

6. A fine

R1-24

15

R25-49

16

R50-99

17

R100-500

18

Above R600

19

7. A whipping (cuts)

20

8. Correctional supervision

21

9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

22

10. Suspended sentence

23

24-25

C11 Someone stealing R100 worth of goods from a shop (B11)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	26-27

## C12 Someone murders another (B12)

1. The sentence of death

01

2. Imprisonment

0-5 months

02

6-11 months

03

12-23 months

04

2-3 years

05

4-5 years

06

6-7 years

07

8-9 years

08

10-14 years

09

15-19 years

10

20-30 years

11

3. Periodical imprisonment

12

4. Declaration as an habitual criminal

13

5. Committal to any institution established by law

14

6. A fine

R1-24

15

R25-49

16

R50-99

17

R100-500

18

Above R600

19

7. A whipping (cuts)

20

8. Correctional supervision

21

9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

22

10. Suspended sentence

23

28-29

C.12.1 Was the sentence you have chosen for this particular crime influenced by your personal knowledge of its happening to either:

A close friend

1

An acquaintance

3

A family member

2

Other (Specify)

4

None of these

5

30

C13 Someone guilty of the crime of manslaughter (B13)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	31-32

C14 The rape of someone (B14)

1. The sentence of death

01

2. Imprisonment

0-5 months

02

6-11 months

03

12-23 months

04

2-3 years

05

4-5 years

06

6-7 years

07

8-9 years

08

10-14 years

09

15-19 years

10

20-30 years

11

3. Periodical imprisonment

12

4. Declaration as an habitual criminal

13

5. Committal to any institution established by law

14

6. A fine

R1-24

15

R25-49

16

R50-99

17

R100-500

18

Above R600

19

7. A whipping (cuts)

20

8. Correctional supervision

21

9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

22

10. Suspended sentence

23

33-34

C.14.1 Was the sentence you have chosen for this particular crime influenced by your personal knowledge of its happening to either

A close friend	1	An acquaintance	3
A family member	2	Other (Specify)	4
		None of these	5

35

C15 The act of terrorism (B15)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	36-37



## C16 Someone acts fraudulently (B16)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	38-39

C17 An act of corruption (B17)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	40-41

C18 An act of political intimidation (B18)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 yearss	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	42-43

C19 The selling of illegal drugs (B19)

1. The sentence of death		01	
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Conmittal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	44-45

C20 An offence of assault and robbery (B20)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	46-47

## C21 Driving a motor vehicle whilst over the legal alcohol level (B21).

1. The sentence of death

01

2. Imprisonment

0-5 months

02

6-11 months

03

12-23 months

04

2-3 years

05

4-5 years

06

6-7 years

07

8-9 years

08

10-14 years

09

15-19 years

10

20-30 years

11

3. Periodical imprisonment

12

4. Declaration as an habitual criminal

13

5. Committal to any institution established by law

14

6. A fine

R1-24

15

R25-49

16

R50-99

17

R100-500

18

Above R600

19

7. A whipping (cuts)

20

8. Correctional supervision

21

9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.

22

10. Suspended sentence

23

48-49

C22 As question B21, but causing the death of an innocent victim.  
(culpable homicide) (B22)

1. The sentence of death	01		
2. Imprisonment	0-5 months	02	
	6-11 months	03	
	12-23 months	04	
	2-3 years	05	
	4-5 years	06	
	6-7 years	07	
	8-9 years	08	
	10-14 years	09	
	15-19 years	10	
	20-30 years	11	
3. Periodical imprisonment		12	
4. Declaration as an habitual criminal		13	
5. Committal to any institution established by law		14	
6. A fine	R1-24	15	
	R25-49	16	
	R50-99	17	
	R100-500	18	
	Above R600	19	
7. A whipping (cuts)		20	
8. Correctional supervision		21	
9. Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.		22	
10. Suspended sentence		23	50-51

Under certain circumstances, the sentence handed down by the court is influenced by other conditions. Listed below are some circumstances which might influence the treatment which an offender is given. Please indicate whether you feel that the offender usually should be given a HARSHER sentence or a LIGHTER sentence in view of each situation described, or whether it should MAKE NO DIFFERENCE in your opinion. The interviewer will circle the number which designates your answer for each situation.

	Usually a HARSHER Sentence	Usually a LIGHTER Sentence	Makes NO Difference	
The offender has a prior record for crime against property	1	2	3	52
The offender has a prior record for crime against persons	1	2	3	53
The offender is under 21 years of age	1	2	3	54
The offender is over 60 years of age	1	2	3	55
The offender is female	1	2	3	56

#### SECTION D

##### DECRIMINALISATION OF SPECIFIC OFFENCES

Decriminalisation is defined as a criminal offence which is removed from the range of criminal actions - in other words, the action is no longer considered to be a crime punishable by law. Please answer either "YES", "NO" OR "DON'T KNOW" to each of the following crimes:

D1 Should prostitution remain a crime punishable by law?

1	2	3	
YES	NO	DON'T KNOW	57

D2 Should the possession of dagga remain a crime punishable by law?

1	2	3	
YES	NO	DON'T KNOW	58



D3 Should gambling remain a crime punishable by law?

1	2	3	
YES	NO	DON'T KNOW	59

D4 Should abortion remain a crime punishable by law?

1	2	3	
YES	NO	DON'T KNOW	60

D5 Should homosexuality/lesbianism be considered as a crime punishable by law?

1	2	3	
YES	NO	DON'T KNOW	61

THANK YOU VERY MUCH FOR YOUR  
CONTRIBUTION

D. Pitfield  
Tel: 060907

## **The sections of the questionnaire and statute sentences**

**Section A** aimed to gather demographic information from the respondent. This section contained a sub-section (Section A2:1-7) which concentrated on respondent victimisation and respondent perceived fear/anxiety of crime in society.

**Section B** considered seriousness attitudes towards specific crimes. Respondents were asked to rate, on a scale of 1 (very serious) to 5 (not at all serious), their opinion on how serious a crime is, for 22 crimes. The first eleven (11) crimes were of a *general* nature, included within this research because, having been taken directly from the British Crime Survey (1984), it was hoped that they would provide some material for comparisons between the United Kingdom and South Africa. The second eleven (11) crimes were of a *specific* nature. According to Childs (1965:15) the only way that one can identify the perceived beliefs of a person is in terms of "...definitely worded statements and question[s] under interview conditions". Therefore, the second eleven crimes in this section (B12-22) provided *hypothetical* descriptions of specific crimes. Thus it was hoped that it would be more likely for all respondents to consider, as near as possible, the same crime. It is to be noted that as *near as possible* unfortunately does not always amount to *the same* crime. Language nuances obviously have a bearing on understanding, but it is not within the scope of this research to investigate this aspect further.

**Section C** considered again the same 22 crimes of Section B, now requesting respondents to offer an appropriate sentence for each of these crimes. Respondents were instructed: "The following sentencing options are available to the South African courts as a means of punishment for specific crimes. You are now asked to "sentence" each crime you gave a "seriousness" score to in the previous section (section B)".

## **The denoted sentences**

The sentence options available to the South African courts in November, 1993, (taken from Article 276 of the Criminal Procedure Act, Act 51 of 1977) as a means of punishment for crime, are reproduced hereunder in full, together with additional instructions as given to respondents where necessary:

**(1) The sentence of death** (since declared unconstitutional by the Constitutional Court on 6th June 1995, [and later certified by the New Constitution on December 6 1996] ref.: *S v Makwanyana and another* 1995 (2) SACR 1 (CC)).

**(2) Imprisonment**, including imprisonment for life

**Note:** that in South Africa, the sentence of "life" usually equates to 20 years, unless the courts direct otherwise. Respondents were instructed as follows: If you "sentence" an offender to imprisonment, please indicate the term of imprisonment you would wish to see imposed.

**(3) Periodical imprisonment:**

Periodical imprisonment involves the offender being sentenced to a number of hours in a prison establishment. These hours are *worked* over weekends. During the week the offender continues his/her normal life-style (lives at home, goes to work etcetera). He/she enters the prison establishment on Friday late afternoon and leaves again early on Monday morning, until the sentence hours have been worked off.

**(4) Declaration as an habitual criminal**

This sentence is an indeterminate sentence applied in the case of the most hardened criminal. The minimum duration of imprisonment is 7 years.

**(5) Committal to any institution established by law:**

The court is able to recommend that the offender be removed to an institution either for treatment or for rehabilitation - for example a mental hospital or a rehabilitation centre.

**(6) A fine**

The fine is a popular form of sentence throughout the world and is usually assigned in terms of the offender's means. Respondents were instructed that, if they chose this option, they were to indicate the amount they would like to see paid by the offender.

**(7) Corporal punishment (whipping - cuts)** - (since declared unconstitutional in the case of young offenders by the Constitutional Court on the 9th June 1995 [certified by the New Constitution on 5 December 1996], ref.: *S v Williams*, 1995 (2) SACR 251 (CC)).

This form of punishment is more usually applied to juveniles than to adults (a juvenile can be subjected to a maximum of 7 cuts administered by a light cane). However, 7 cuts can also be recommended by the court as a sentence for an adult. Respondents were instructed to consider this form of punishment in terms of adults only.

#### **(8) Correctional supervision**

This sentence can involve numerous *checks* upon an offender. He/she may be required to report at regular intervals to a correctional supervision officer. He/she may be required to be at home after certain hours, to refrain from frequenting certain places or associating with certain people. Alternatively, the offender may be required to attend specific types of *treatment programmes*, for example a psychological programme.

#### **(9) Imprisonment from which an offender may be placed under correctional supervision in his discretion by the Commissioner.**

If this sentence is imposed by the courts it means that an offender is required to serve a period of imprisonment, after which he/she is released into the community subject to a period of *checks* as at (8) above. (NB Both term of imprisonment and "check" periods are decided by the court at the time of sentence).

#### **(10) The suspended sentence**

This sentence is more usually applied to a juvenile. But here respondents were instructed to consider the suspended sentence in terms of the adult offender. Basically, the court decides upon a term of imprisonment to be served in relation to the offence committed, but this term is suspended (held over) for a period of time during which the offender is required to remain offence free and to submit to certain conditions decided by the court (as at (8) above). If the offender offends again whilst under suspended sentence, the court has the authority to re-instate the prison term originally imposed.

#### **Section C sub-section**

After deciding sentences for the 22 crimes, the respondent was asked to reconsider the sentence chosen, in a general manner, in terms of either mitigating circumstances or other conditions. The respondent was asked to say whether each of these circumstances/conditions would make him/her consider a **harsher sentence**, a **lighter sentence** or, if it would **make no difference** to the sentence decided. The circumstances/conditions which were offered for consideration are as follows:

The offender has a prior record for crime against property

The offender has a prior record for crime against persons

The offender is under 21 years of age

The offender is over 60 years of age

The offender is female

**Section D** investigated the respondent's ideas on the decriminalisation of specific offences. Five crimes were proposed in relation to decriminalisation and the respondent merely had to answer 1) yes, 2) no, or 3) don't know, to each question. The crimes dealt with were as follows:

- 1) Should prostitution remain a crime punishable by law?
- 2) Should the possession of dagga remain a crime punishable by law?
- 3) Should gambling remain a crime punishable by law?
- 4) Should abortion remain a crime punishable by law? (See end note 1)
- 5) Should homosexuality/lesbianism be considered as a crime punishable by law?

**N.B.** Question 5 is worded slightly differently from the other four decriminalisation crimes. According to the Sexual Offences Act No.23 (1957:621), South African statute would appear to uphold the directives operational in other parts of the world concerning homosexuality. The Act states that homosexuality becomes an offence punishable by law when the privacy of other societal members is threatened. Section 19(b) of The Act prohibits a homosexual encounter which is **within view of any public street or place or in any place to which the public have access**, whilst Section 20A of The Act states:

*Acts committed between men... which are calculated to stimulate sexual passion or to give sexual gratification [are] prohibited. A male person who commits [such an act] with another male person...shall be guilty of an offence".*

Female lesbianism is not taken up by The Act, but it is reasonable to assume that the same legal rule applies.

#### END NOTE 1

The Choice on Termination of Pregnancy Act came into effect on February 4 1997. See also other references to the abortion law as it was publicly debated previous to February 4, variously within other chapters of this work.

## **ANNEXURE "B"**

### **The White areas**

There are seventeen predominantly White suburbs within the boundaries of the City of Pretoria. These seventeen suburbs have, according to the demographic housing maps supplied by the Pretoria City Council, some 8770 stands/housing units.

Using purposive selection, five White suburbs were chosen to take part in the survey. As noted above, choice was based solely on socio-economic factors. The five White areas chosen, and the number of interviews required within each, are shown hereunder:

<b>Suburb</b>	<b>H.Units</b>	<b>%/Cum.Sum.</b>	<b>No.Intvs.</b>	<b>Total cum.sum.</b>
Brummeria	167	3,3	3	
East Lynn	1 160	22,6	23	
Jan Niemandpark	800	15,6	16	
Silverton	2 759	53,8	54	
Val de Grace	242	4,7	4	5128

The 100 interviews were allocated to the chosen suburbs in proportion to number of housing units. This meant that the more housing units within a suburb, the larger the sample drawn from that suburb. Taking the smallest suburb as an example it is shown that Brummeria, with 167 housing units, gives a proportion of 3,3% ( $167/5128$ ), so that three interviews would be conducted within that particular suburb.

### **The Black area**

Mamelodi was the chosen Black area (commonly known as a township in pre-independent South Africa) used for this research. The Mamelodi township lies to the East of Pretoria and covers some 2 222 ha. which is divided into 2 sections, (Mamelodi West the older section, and Mamelodi East, the newer section). Further sub-divisions provide for 12 housing extensions.

As, once again, only 100 interviews were required from the *total* population, it was impracticable (time consuming and expensive) to divide these interviews between all 12 extensions. Using Stoker's random sampling number tables, an initial 7 extensions were chosen from the total 12. Final selection of 5 extensions was purposively undertaken, mainly because fewer extensions meant more interviews within each, which effectively addressed the impracticability's of time consumption and financial constraints (field worker involvement).

The 5 chosen extensions within Mamelodi were as follows:

Extension No.	No. Units	% Cum.Sum	No.Intvs.	Total cum.sum
3	1419	17,6	18	
5	1520	18,8	19	
8	1771	21,9	22	
10	1350	16,7	17	
14	2021	25,0	24	8081

*\*N.B.extensions are "new" areas proclaimed by the City Council extra to, in this case, Mamelodi "proper". This definition applies to all references to "extension" herein.*

From this point on, selection procedures were as detailed at 7.5.1 in text. For example: extension 3 contained 1419 stands/houses providing a proportion of 17,6% (1419/8081) equating to 18 interviews within that extension.

### **The Coloured area**

Eersterust was the chosen Coloured area (township) for the research. The Eersterust township lies to the North East of Pretoria, and is made up of Eersterust proper (extension 1) and 6 extensions. All extensions in Eersterust contain cross-sections of socio-economic housing and all seven extensions were surveyed for the research. Allocation of households to extension followed the scheme laid out in section 7.5.1 in text, as shown hereunder:

Extension	H.Units	% Cum.sum	No.Intvs.	Total cum.sum
1	73	1,7	2	
2	1063	25,5	26	
3	214	5,1	5	
4	574	13,7	14	
5	406	9,8	10	
6	1831	44,2	43	4161

### **The Asian area**

Laudium was the chosen Asian area (township) for the research. The Laudium township lies to the West of Pretoria and is made up of Laudium proper (extension 1) and 4 extensions. All extensions of Laudium contain cross-sections of socio-economic housing and all five extensions were surveyed for the research. As in other areas, the 100 interviews were allocated to extensions according to size and number of housing units within extension as detailed below:

Extension	H.Units	% Cum.sum	No.Intvs.	Total cum.sum
1	1620	49,0	49	
2	248	7,5	8	
3	731	22,1	22	
4	31	1,0	1	
5	673	20,4	20	3303



## **ANNEXURE "C"**

### **The signed field-worker undertaking**

6 November 1993

I the undersigned undertake to deliver to Mrs Pitfield, on or before Tuesday 30th November, 100 fully completed questionnaires as per the interview schedule provided. Payment will be made at R20 per completed questionnaire.

Each question on the questionnaire will be coded by me.

I understand that if any of the questionnaires are incomplete at time of delivery, I will not receive payment until they are completed.

Questionnaire Nos: from:.....to:.....

Signed:

Fieldworker.....

Project organiser.....

868987(H) 429-6269(W)

Dated.....

### **The field-worker time-table**

<b>Monday 6 November 1993</b>	-	Distribution of questionnaires to field-workers
<b>Saturday 12 November 1993</b>	-	Meeting with field-workers: completed questionnaires handed to researcher, discussion on administration, time-schedule, difficulties encountered etcetera
<b>Saturday 19 November 1993</b>	-	Meeting with field-workers: (as above)
<b>Saturday 26 November 1993</b>	-	Meeting with field-workers: (as above)
<b>Tuesday 30 November 1993</b>	-	Delivery/collection of remaining questionnaires

## **ANNEXURE "D"**

### **Brief historical backdrop to the Sentencing Guidelines**

According to Doob (1993:4), prior to 1 November 1987, sentencing and appeal processes in the United States were underdeveloped. There was no legislative guidance on principles or purpose (unlike the U.K.), high statutory maxima, and very little, if any, appellate guidance. Prison sentences were indeterminate. The Parole Board, through a system of guidelines, determined the length of time an offender would actually serve in prison. Doob notes that because judicial decisions had little to do with length of prison term there was no point appealing a sentence. Appeal courts did not develop case law principles and had little to do with accomplishing various purposes of sentencing - again, unlike the U.K. Punishment of offenders was totally discretionary and thereby disparate. The root of the problem was that sentencing was the one function given to federal judges which was not governed by law. Against this backdrop, Congress passed the Sentencing Reform Act of 1984 (chapter II of the Comprehensive Crime Control Act). The Act's goals were similar to those expressed variously by legislation on sentencing reform in the U.K. since 1961, viz., uniformity (to narrow disparity of sentence between courts for similar crimes), proportionality (according to Doob defined in terms of harsher punishment), and honesty in sentencing (the abolishment of the parole commission, making the sentence handed down by the courts the sentence served).

The rationale which led to the initiation of sentencing guidelines in the United States was stimulated both by public perceptions of leniency and, thereafter, by political need. In this respect Doob variously indicates that sentencing within the United States has had more to do with politics than law and that political manoeuvrings formed the platform for public disquiet on crime, rather than research data. The public invariably perceived sentences to favour the defendant over the victim. The public therefore supported Congress in its call for harsher sentences which were to be proportionate to the harm caused by a particular offence. The call to the Commission was clearly spelt out "...that sentences should be tough, there was to be no unwarranted variation, judges were not to be allowed to use discretion and sentencing was to be brought into control through an adherence to rigid guidelines (Pitfield, 1994:57)". Thereby, the Commission's brief was to provide definitive guidelines which would enable the criminal justice system to reduce crime through effective and fair sentencing: utilitarian ideals *for the good of all* became of paramount importance.

### **The Guideline Grid**

As already noted, the sentencing guideline grid is a matrix tabulation which uses numerical variants to enable sentencers to measure the crime and the offender *details* viz., age, circumstance, past demeanours etcetera, against the sentence/punishment grid decided by the Commission. Briefly, the matrix is a two-dimensional grid with 43 rows corresponding to offence levels and six columns corresponding to six categories of criminal record. Once the

level of offence and record of the offender have been determined, all that remains is to read the corresponding punishment/sentence range off the guideline table. The offence and conviction determine the row and a simple calculation of criminal record determines the column.

To all intents and purposes this sounds like a simple process but, of course, in practice it is not that simplistic. Determining the appropriate level of offence presents serious problems, not least of which is the Commission's insistence that the *relevant conduct* of the offender be used to determine the level of the offence rather than the offence itself. *Relevant conduct* is not easily defined and relates not to criminal offences but rather to a sort of *penal value*. One offence can involve the whole table covering the offence itself and the offender's role. This means that the offender can be convicted of one count of an indictment and have the offence level determined by two separate sets of factors i.e., the judge's assessment of the facts directly involved in the offence of conviction, and a whole range of other related activities that are not covered by that one conviction

The use of the guidelines is mandatory and although some departure from the guideline table is possible, to invoke such departure involves a need to show circumstances which are considered to be *extraordinary and compelling*. Sentencers can depart from a guideline sentence when they find aggravating or mitigating circumstances that were not adequately taken up by the Sentencing Commission.

It is variously accepted by many writers that the guideline grid has problems, see for example Parent (1988), von Hirsch (1993) and Tonry (1993), but for the purpose at hand these problems need not concern us here. What is of import, is that the United States Sentencing Guidelines appear to be directly oppositional to the juridical sentencing policy in the United Kingdom and the changes taking place within the sentencing reform movement. Von Hirsch (1993:6,7) places these differences in the perceived vulnerability of the guideline system as opposed to the vulnerabilities in the judicial system of statutory principles employed within the UK. In this respect he indicates that the system of judicial principles in the UK do not readily allow for amendments to be made (unlike the U.S. guideline system which can bend to law-and-order pressure - quickly being amended or diluted to suit the political mood of the moment - as in the case of the directive to "get tough on drug offences") because, as indicated by Thomas (1993:variously), firstly legislation in the U.K. is subject to a laborious and protracted procedure involving the reading of White Papers, initiated by the U.K. Parliament, which are necessary in order to ratify legislative change. And, secondly, as the principles are stated in general terms, they are open to nullification by the courts: the courts can simply interpret them as they wish. As an example of the first vulnerability, von Hirsch (1993:7) cites the new Parliamentary proposals to increase sentences for bail crimes, whilst in terms of the second, he cites the

recent Court of Appeal decision which states that the prevalence of an offence, and the need to deter it, may be considered in determining whether it is serious enough to warrant imprisonment under the provisions of the 1991 Criminal Justice Act.

Considering the United States Sentencing Guidelines von Hirsch says that in the first instance (sensitivity to law-and-order pressures), "The theory of the sentencing Commission is that it is more insulated from political pressures..." whilst in terms of the second (judicial nullification), he suggests that "Numerical guidelines...may well be more resistant to judicial nullification... [because] the tariff is set forth in the grid..." and does not permit judicial interpretation. He further notes that "A court in Minnesota wanting to do what the English Court of Appeal did - considering need-for-deterrence as a reason for invoking imprisonment - would have more difficulty, as need for deterrence is simply not part of either the seriousness or the criminal record score".

There is a built in rigidity in guideline sentencing grids and it is this inflexibility which poses problems for many authors on the subject. For example Ashworth (1993:8) notes the inherent difficulties involved in a system which takes away judicial discretion to the extent that U.S. guidelines do by suggesting that they may indeed "choke" on their inability to differentiate between differently situated offenders. Tonry (in Doob 1993:variously) suggests that guidelines which are too rigid and harsh might force judges to choose between imposing a sentence which is unjust, or trying to achieve just results by means of choosing between an obligation to do justice or an obligation to enforce the law". But for all its faults Doob maintains that the U.S. Sentencing Commission has shown that sentencing practice can be changed dramatically in a short period of time, whilst from the point of view of this study, the United States Sentencing Guidelines serve to illustrate how two different systems of criminal justice (U.K./U.S.A.) have evolved from the same theoretical demands.

## ANNEXURE "E"

### The debate on the death penalty and corporal punishment

Following from the brief discussion of the constitutionality of the death penalty in Chapter 4, section 2.4.1, the main tenets of the judgement debate which took place are as follows.

Chaskalson began by considering such areas as arbitrariness and irreversibility of the death penalty, the human right to dignity, the human right to life and, variously, decisions from other jurisdictions overseas. Having completed his deliberations concerning "stage-one" (see Chapter 4, section 2.4.1) of the process Chaskalson ruled that "...the accused had succeeded in proving that some of their fundamental rights were infringed by capital punishment" (1996:4-9). In reaching this judgement Chaskalson indicated that "[A]ccepting, for argument's sake, that public opinion was in favour of retention of the death penalty..." (a fact upheld by the research to follow), notwithstanding that there might be some relevance to the enquiry at hand, public opinion could not be considered a decisive factor since "...the matter may [then] as well have been left to Parliament, which is responsible to the people". If the decision was left to Parliament to decide Chaskalson said it, "...would constitute 'a return to parliamentary sovereignty and a retreat from the new legal order established by the 1993 Constitution (Para [88])' (in Van Der Merwe 1996:4-9). Chaskalson's judgement read as follows:

*The carrying out of the death sentence destroys life, which is protected without reservation under s 9 of our Constitution, it annihilates human dignity, which is protected under s 10, elements of arbitrariness are present in its enforcement and it is irremediable. Taking these factors into account, and giving the words of s 11(2) the broader meaning to which they are entitled at this stage of the enquiry, rather than a narrow meaning, I am satisfied that in the context of our Constitution the death penalty is indeed a cruel, inhuman and degrading punishment (Para. [95]). (in Van Der Merwe 1996:4-9).*

One might suggest that Chaskalson's interpretation of the meaning of parliamentary sovereignty is at odds with the *true* meaning, at least in terms of the meaning of sovereignty advocated earlier within this work (see chapter 1, section 3.0), where it was argued that legitimacy of a legal system relies upon public compliance and consensus in terms of individual citizen wishes. The courts status, it was suggested, rests upon public accountability which involves a moral sanction relative to public consent and universality. Seen in this light, parliamentary sovereignty "which is responsible to the people", is just as accountable in terms of protection of the rights of the victim (who in this case through no fault of their own forfeited the right to life and dignity etcetera), as it is to protect the rights of the wrongdoer. However, to return to Chaskalson's judgement, "stage-two" proceeded as following.

Concerning "stage-two" (that the death penalty is a legitimate form of punishment which should be retained for reasons of necessity), Chaskalson was further concerned with the arbitrariness in imposition. He suggested that life imprisonment could just as successfully address the main contentions of the Attorney-General (who argued that the death penalty is a deterrent to violent crime, that it meets society's need for adequate retribution for heinous offences and is regarded by South African society as an acceptable form of punishment (in Van Der Merwe 1996:4-10)), without infringement of rights and the finality of irreversibility and, was less arbitrary in application. Chaskalson, according to Van Der Merwe, also successfully negated the Attorney-General's contention that State-authorised killing is not unconstitutional in times of war, and that all punishment infringes upon the dignity of the criminal (death or imprisonment), by arguing that "[K]illing by the State takes place long after the crime was committed...[which does not] permit the careful consideration of alternative punishments (Para. [138])", and ruled that "There is a difference between encroaching upon rights for the purpose of punishment and destroying them altogether (Para. [143])" (Van Der Merwe 1996:4-13). Thereby, the Attorney-General's argument for retention of the death penalty in terms of its legitimacy failed with Chaskalson's judgement that:

*Retribution cannot be accorded the same weight under the Constitution as the rights to life and dignity...Chapter 3...it has not been shown that the death sentence would be materially effective to deter persons or prevent murder than the alternative sentence of life imprisonment....Taking these factors into account, as well as the elements of arbitrariness and the possibility of error in enforcing the death penalty, the clear and convincing case that is required to justify the death sentence as a penalty for murder has not been made out (Para. [146]) (in Van Der Merwe 1996:4-14).*

Chaskalson's judgement appears to have formed the platform from which the remaining 11 justices debated the constitutionality of the death penalty. Utilising Van Der Merwe's (1996:4-23) conclusion (in which he notes that a reading of all 12 judgements provides an "almost encyclopaedic" effect), but omitting his personal criticism, one can identify the primary judgement points. For example that all 12 judges depend upon the sentence of life imprisonment as an alternative to the death penalty. However, none of the 12 seem to provide a guideline on what *life* actually implies in terms of prison time served. One may perhaps be forgiven for wondering, if in the case of the very worst type of murder - the type where the death sentence would have been mandatory before the new constitution - whether it is morally correct to exert further time and resources to decide this issue. And, one has perhaps to agree with Van Der Merwe's concern that the sentence of life may in time also be judged as unconstitutional - Van Der Merwe (1996:4-24) says "...since it removes the right of freedom of personal movement" (subsequently, not taken up in the final Constitution). Not

wishing to belabour the point, one must surely not lose sight of the *removal* of rights suffered by the victim. In this respect Van Der Merwe's (1996:4-24) comments are justifiably noteworthy, effectively highlighting as they do the cleft-stick situation which is now apparent between the rights of the offender and the rights of the victim. Whilst it remains to be seen how the constitutionality/nonconstitutionality debate on the death sentence in South Africa will *finally* resolve, Van Der Merwe (1996:4-24) sums up what the present so called cleft-stick situation actually means in this way:

*This leads one to the whole question of public opinion and the text of the Final Constitution. During the writing of this (December 1995) people are still being exhorted to 'help write the Constitution'. At the moment s 10 of the Draft Bill for the new Constitution represents the two basic views on the death penalty:*

*LIFE*

*10*

***Option 1 \****

*Everyone has the right to life [and the death penalty is hereby abolished].*

***Option 2***

*Everyone has the right to life, and the right not to be deprived of life except by execution of a court sentence following conviction for a crime for which the death penalty is prescribed by an Act of Parliament.*

*This represents a personal, and collectively, a political choice. Thus the 'public opinion' that was argued and ignored during the Makwanyane case, will now finally become relevant.*

\* See endnote 1, Chapter 4.

### **The debate on whipping**

Following from the brief discussion of the constitutionality of whipping in Chapter 4, section 2.5, many of the concerns expressed about the death penalty (see Chapter 4, sections 2.4 - 2.4.2 and above), can be seen within the debate on whipping, for example that it is inhuman and degrading. It was also argued that equality was contravened, s 8 (1) of the Constitution; that there were conflictual elements involving s 10 of the Constitution which provides all with the right to respect, protection and dignity; and with s 10 of the Constitution concerning the protection of vulnerable children. But foremost in the debate, whipping contravened s 11(2) of the Constitution forbidding conduct which is torturous, cruel (treatment or punishment), inhuman (treatment or punishment), or degrading (treatment or punishment) ( in Van Der Merwe 1996:4-28).

The same "two-stage" procedure of judgement was utilised, i.e. that once a *prima facie* infringement of a fundamental right had been proven by the applicant, the onus was then placed upon the State to prove justification in terms of s 33(1) of the Constitution. In this respect the State put forward the suggestion that, unlike the death penalty, there is no other sentence alternative to whipping and it provides a worthwhile deterrent effect. Both suggestions were discharged. The first by following international trends which promote the veering away from vengeance towards rehabilitation (debatable both in terms of Van Der Merwe's opinion and in terms of the theoretical argument put forward earlier in this study), and the second by consideration of the fact that three of the applicants had already been subjected to the punishment of cuts for previous misdemeanours, with obviously no success. Thus the judgement *found* that the punishment of whipping did not provide sufficient deterrent effect to "...significantly enable the State to override the right entrenched in the Constitution (Para. [84] of the judgement) (in Van Der Merwe 1996:4-30). Van Der Merwe (1996:4-31) concludes by saying "Thanks to another unanimous decision of the Constitutional Court, all judicial whippings are now unconstitutional".